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# From Imperial Scholar to Imperial Student: Minimizing Bias in Article Evaluation by Law Reviews

Rachel J. Anderson\*

## I. INTRODUCTION

Law professors have been complaining about student-run law reviews for decades;<sup>1</sup> an expression of dissatisfaction with the evaluation of legal

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1. Fred Rodell is often credited with the first criticism of law reviews. See Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936). The responses to this criticism range from calls for eliminating student-run law reviews and replacing them with peer-reviewed journals, to taking the bad with the good and accepting student-run law reviews as they are. See Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741 (1998), for a bibliography of scholarship critiquing the publication and editorial process. However, despite their weaknesses, due to their continually changing memberships, student-run law reviews may be best-suited to keeping up with the evolution of society in a way that journals

scholarship and selection of articles by law students is not new.<sup>2</sup> Corporate law scholars complain that students are not interested in publishing scholarship on corporate issues. Critical race scholars complain that students are not willing to publish scholarship that explores the role of race in the law. Feminist scholars complain that students assume that "women's issues" are not important beyond the reach of family law. International law scholars complain that students do not believe that their scholarship is of general relevance.

At the same time, an army of complaining law professors does not automatically mean that there is something wrong with the way students evaluate scholarship. It is possible that professors are so puffed up with their own importance that they cannot accept that someone else, a "mere law student" at that, might not believe that their article is the greatest contribution to modern society since sliced bread. Perhaps it is simply a case of selection bias whereby the loudly complaining professors represent only a small minority of law professors but appear to represent multitudes because of their vociferousness. Maybe it is just a case of "win some, lose some," and professors overlook the many "wins" that balance out their comparably less frequent "losses," but it could also be that "where there's smoke, there's fire."

Assuming there is a fire, why should we care? Among other functions, law reviews contribute to the development and transformation of legal theory. Over time, transformations of legal scholarship contribute to changing the "criteria for analyzing judicial opinions, statutes, regulations, and the scholarship that attends to each of them."<sup>3</sup> These transformations are often

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run on a purely peer-review basis may be hard-pressed to achieve. This Article suggests that it is possible to address the weaknesses of law reviews and still retain law reviews as a vital training ground for future scholars and practitioners, strengthen the potential of law reviews to reach one of their original goals of serving as a situs for rigorous intellectual debate and development of the law, and respond rapidly and effectively to the expanding pluralism in legal scholarship. See Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 251 (1988) (discussing the advantages of student-run law reviews).

2. Of course, it is possible and even likely that students on law reviews have been complaining about professors overvaluing the importance of their particular field and articles for just as long. However, students' complaints about law professors, however well-founded, do not negate the potential validity of professors' complaints.

3. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 892-93 (1992). Traditional assumptions regarding legal scholarship include an emphasis on legal doctrine, the use of conventional methods of legal analysis and argument, and the usefulness to practitioners, appellate advocates, and the courts. See Kissam, *supra* note 1, at 221. See also HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 32-33 (1972); Douglas B. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181, 183-84 (1930); Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1095 (1986); John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 321-24 (1985); Rodell, *supra* note 1; Ronald D. Rotunda, *Law Reviews - The Extreme Centrist Position*, 62 IND. L.J. 1 (1986).

fueled by challenges to dominant perspectives, ideologies, or methodologies. Such challenges are often found, for example, in scholarship on gender and race.<sup>4</sup> They are also fueled by scholarship, for example, in less “sexy” fields such as tax, antitrust, and corporate law. In addition, the distress of the marginalized can signal a problem that negatively affects everyone in the legal academy or in society as a whole.<sup>5</sup>

In *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy*, Lani Guinier and Gerald Torres use the metaphor of the miner's canary to show how the challenges faced by parts of society can signal problems with society as a whole.<sup>6</sup> Miners often take canaries into the mine when they are working because canaries show the effects of poisonous gasses before the effects become apparent in humans.<sup>7</sup> If a canary collapses in the cage while in the mine, then the miners know that they need to leave the mine before they, like the canary, die from breathing the poisoned air.<sup>8</sup> Guinier and Torres maintain that the analogy of the miner's canary teaches us to look to the social atmosphere for the source of complex social problems rather than to the segment of society that is being negatively affected by those problems.<sup>9</sup> They also suggest that the canary alerts us to an opportunity to improve the social atmosphere and, as a result, society as a whole.<sup>10</sup> In the context of article evaluation by law reviews, the complaints of law professors are warning signs that signal a need and an opportunity to look more closely at the process of article evaluation by law students and ways to improve it.

The social atmosphere in which articles are evaluated by law students influences the construction of a legal marketplace of ideas. A well-functioning article evaluation process facilitates a rigorous intellectual exchange. A rigorous intellectual exchange requires the inclusion of a range of ideologies, methodologies, perspectives, and voices.<sup>11</sup> This exchange is

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4. Rubin, *supra* note 3 (citations omitted). See e.g., Carrie Menkel-Meadow, *Taking Law and \_\_\_\_\_ Really Seriously: Before, During and after “The Law,”* 60 VAND. L. REV. 555, 559 (2007).

5. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002).

6. *Id.* at 12.

7. *Id.* at 11.

8. *Id.*

9. *Id.* at 12.

10. *Id.*

11. For a discussion of the difference between voice and perspective, see generally Jerome M. Culp, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61, 63-68 (1992) (distinguishing between “black voice” imposed on scholars from the outside and “black perspective” consciously claimed by scholars). For a discussion of “voices,” see, e.g., Ana Gazra, *The Voice of Color and Its Value in Legal Storytelling*, 1 HISP. L.J. 105, 108 (1994) (contending “a distinct voice of color does in fact exist, and, in conjunction with legal storytelling, it can achieve what tradi-

an integral part of the production of knowledge and the advancement of legal discourse.<sup>12</sup> Legal scholarship also contributes to shaping law school curricula as well as influences the education and careers of law students and legal scholars.<sup>13</sup> For example, publication in law reviews plays an important role in the legal academy and affects the value attributed to both a specific article and the author who wrote it, and publication may also influence hiring, promotion, and tenure of law professors.

Of course there are those who argue that the influence of articles in law reviews is declining.<sup>14</sup> They argue that no one reads law review articles beyond the incestuous group of law professors who write them. The conclusion is that if law review articles are not read by judges and practitioners, then they are not influencing the making of law in "real-life." This view is inaccurate. Although law review articles may not always have the effect outside of the academy that their authors desire, court decisions do cite law review articles from time to time. For example, dissent scholarship in the form of feminist legal theory has helped shape the legal discourse in areas such as sexual harassment.<sup>15</sup> Additionally, although it is possible to make a colorable argument that law review articles do not always have far-reaching effects, this does not negate the importance of law review articles in the legal academy. For example, feminist legal theory contributed to major shifts in the legal discourse.<sup>16</sup>

Legal academics and law review editors read law review articles, or at least parts of them. Most law review editors become judges, practitioners, or law professors, and their law review experience helps develop skills and knowledge that will make them better judges, lawyers, and professors.<sup>17</sup>

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tional scholarship has failed to by providing a true understanding of minority races," and "a voice of color is not found in literature written by non-minorities").

12. See Rubin, *supra* note 3, at 901 ("Challenges to mainstream scholarship provide a means by which a field can redefine itself, shifting its ambit of inquiry.").

13. See Edwin J. Greenlee, *The University of Pennsylvania Law Review: 150 Years of History*, 150 U. PA. L. REV. 1875-78 (2002) (discussing the impact of the *University of Pennsylvania Law Review*). Law reviews can also have a direct impact when judges rely on law review articles as persuasive authority. See *id.* at 1894. For a bibliography of scholarship about legal scholarship, see Beazley & Edwards, *supra* note 1.

14. See, e.g., Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8.

15. See generally Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 37-39 (1993). For example, Catharine A. MacKinnon's article, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991), was cited in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 929 (1992), *McCann v. Bryon L. Rosquist, D.C., P.C.*, 185 F.3d 1113, 1119-20 (10th Cir. 1999), and *Braden v. Piggly Wiggly*, 4 F. Supp. 2d 1357, 1362 (M.D. Ala. 1998).

16. For discussions of how feminist legal theory has influenced the legal discourse, see generally Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1988-1989); Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1987-1988).

17. Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52

Removing students from this process would only serve to further distance judges and practitioners from the academic legal discourse. In addition to educational and long-term benefits, student-run law reviews are able to respond quickly to changes in society.<sup>18</sup> Interacting with student editors pushes scholars to retain their ability to communicate effectively with a broader segment of society, which might not otherwise be the case in a system dominated by peer-edited reviews. Law is integrally connected to the beliefs and values of society; legal scholarship benefits from retaining an awareness of that relationship. Therefore, law review articles are important, even if the magnitude of their importance is disputed.

It follows that the selection of which articles to publish and where to publish them — also known as article placement — is significant. The evaluation of articles and the determination of which articles to publish are both worth examining because they are core components of the article placement process. This Article focuses on the evaluation of legal scholarship by law review editors.

Despite the best efforts of law professors and law review editors, the evaluation of legal scholarship is often based on values and norms stemming from socio-cultural understandings of law and society, which do not incorporate the breadth of American society across lines of race, class, gender, and sexual orientation. Nor is it reasonable to expect them to do so. No single scholarly norm or standard can rigorously analyze the full range and extent of the breadth and depth of American society. It is this inherent inability that demands a plurality of ideologies, methodologies, norms, and standards to facilitate and ensure a complex and rigorous intellectual debate.

This Article identifies potential sources of systemic weakness in the preparation of law review editors for the evaluation of legal scholarship and suggests ways to strengthen these weak points. Although this Article criticizes some aspects of the student-run law review article evaluation process, it does not suggest, explicitly or implicitly, any malicious intent or lack of dedication and effort on the part of law review editors. The law school curriculum at many, if not most, American law schools does not prepare students with an extensive background and education in the many ideologies, methodologies, norms, and standards used in legal scholarship. Law review editors, who are entrusted with the task of evaluating legal scholarship, are therefore often not equipped with all of the tools and skills that could aid them in their evaluation of legal scholarship.

Several recent articles focus on the influence of proxies for quality,

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N.Y.L. Sch. L. Rev. 349, 360 (2007-2008). See also Rachel Anderson, Marc-Tizoc González, & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CAL. L. REV. 1879, 1936 (2006) ("Student-run law journals are a potential site for students to engage in and shape social justice praxis and critical race praxis within the law school.").

18. Peter Stein, *Law Reviews and Legal Culture*, 70 TUL. L. REV. 2675, 2677 (1996).

such as the author's credentials, on the article selection process.<sup>19</sup> Many of the recent articles on article selection by law reviews primarily make descriptive rather than normative claims. They do not answer the questions that have remained unanswered since the establishment of student-run law reviews: Is there a low-cost way to improve the institution of student-run law reviews? Is there a better way for students to evaluate articles?

This Article suggests answers to the important questions raised above and contributes to the existing body of scholarship on student-run law reviews in four ways. First, although many scholars have described and criticized the way that students evaluate and select articles for publication, scholars generally have been inattentive to the ways in which this process could be improved. This Article shifts the focus from the discussion of how articles are currently evaluated and selected for publication to how law review editors should be evaluating articles. Second, this Article develops theories of safe scholarship and dissent scholarship that help to structure ongoing discussions about the role of students in the publication of legal scholarship. The basic theory is that safe scholarship and dissent scholarship represent two ends of a continuum that can be used to gauge the potential for and types of systemic bias entering into the evaluation of a specific article. Third, this Article takes the evaluation of legal scholarship in a new direction by utilizing a methodology that employs the insights of both critical race theory and law and economics. Applying the economic concepts of information asymmetries, network effects, and switching costs, this Article develops a framework for understanding why and when bias is likely to enter the student editors' evaluation process. Finally, using insights from scholarship on rhetoric and critical reading skills, this Article develops a process to improve the evaluation of articles by students to decrease the potential for unquestioned systemic bias in article evaluation by law reviews, and calls for retraining on an institutional level.

To facilitate this discussion, this Article identifies two categories of legal scholarship: "safe scholarship" and "dissent scholarship."<sup>20</sup> At the individual level, safe scholarship corresponds to the ideologies, methodologies, and standards shared by the evaluator. These often correspond to the "mainstream" legal academy during a specific time period. Conversely, at an individual level, dissent scholarship conflicts with the ideologies, methodologies, and standards shared by the evaluator. Not surprisingly, safe scholarship and dissent scholarship are not static categories: What constitutes safe or dissent scholarship for a particular evaluator is constantly

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19. See, e.g., Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power – Student Editors*, 59 S.C. L. REV. 175 (2007); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results From a National Study*, 71 ALB. L. REV. 565 (2008).

20. These terms are defined and discussed in more detail *infra* in Part II.A., *The Safe-Dissent Continuum*.

evolving and changing over time. Although there is always a danger of overgeneralization, these classifications help to focus this analysis on historical, systemic, and institutional biases that may influence the evaluation of legal scholarship.

This Article is intended to serve as a roadmap for law professors and law review editors alike in their efforts to find a better way for students to evaluate articles. Further, this Article aims to offer low-cost ways to improve the institution of student-run law reviews by strengthening editors' evaluation skills and processes. This Article is divided into three main parts.<sup>21</sup> Part II of this Article, *Manifestations of Systemic Bias*, develops a theory of the safe-dissent continuum and employs this theory to determine whether there is empirical support for claims of bias in article evaluation and the legal discourse.<sup>22</sup> Part III of this Article, *Origins and the Tenacious Nature of Systemic Bias*, utilizes insights from economic theory to examine some sources of and explanations for the persistence of systemic bias in article evaluation by law reviews. Part IV of this Article, *The Article Evaluation Tool Box*, identifies some ways to mitigate the potential for individual and systemic bias in the law review article evaluation process.

## II. MANIFESTATIONS OF SYSTEMIC BIAS

The aim of this section is to follow the smoke of law professors' complaints to its source and to peer beyond the smoke to see whether any canaries are actually dying. This section addresses the question of whether there is any empirical support for the claim that there is systemic bias in article evaluation by law reviews. As examples, this Article primarily uses the relatively recent emergence of subdisciplines, such as critical race theory and feminist theory, to highlight examples of dissent scholarship in the legal academy during specific periods of time. However, this is only an initial excursion into this theoretical construct, which will achieve more breadth and depth over time as the concepts of dissent and safe scholarship are explored in subdisciplines like corporate law, international law, tax law, and other areas of legal scholarship.

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21. This Article uses a hybrid methodology that employs the tools and insights of both critical race theory and law and economics. On critical race theory, see, e.g., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xi-xxxii (Kimberlé Crenshaw et al. eds., 1995). For a discussion of the law and economics movement within American jurisprudence, see generally JAMES R. HACKNEY, JR., *UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY* (2006).

22. "A 'discourse' refers both to a system of concepts — the set of all things we can say about a particular subject — and to the relations of power that maintain that subject's existence." Angela P. Harris, Symposium, Critical Race Theory, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 774 (1994).



### A. THE SAFE-DISSENT CONTINUUM

This section develops a safe-dissent continuum with which legal scholarship can be categorized by the level of legitimacy an individual editor or the legal academy as a whole automatically ascribes to it. To this end, this section defines and begins to flesh out categories of safe and dissent scholarship. In short, safe scholarship is scholarship that is immediately perceived as legitimate and therefore as having possible value. Dissent scholarship is imputed with a lack of legitimacy by an individual or a group and therefore as having little or no value. Systemic bias is more likely to enter into the evaluation process the closer an article is to the dissent end of the continuum.

Dissent scholarship and safe scholarship are not static categories. The lines between safe and dissent scholarship are blurry, permeable, and may vary from scholar to scholar, from law review editor to law review editor, and from law review to law review. In addition, the applicability of these distinctions may vary over time for any specific ideology, methodology, or scholarly subdiscipline.<sup>23</sup>

To define dissent scholarship, it is useful to first define that which is being dissented from: safe scholarship. For example, prior to 1960, legal scholarship tended to conform to "doctrinally oriented analyses and commentaries that had symbolized 'approved' legal scholarship in the 1950s and sixties."<sup>24</sup> It is a worldview that developed out of the values, norms, and experiences of the predominantly white, male,<sup>25</sup> heterosexual (or at

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23. The definitions of ideology and methodology are those used by Rubin in *A Theory of Evaluation*. See Rubin, *supra* note 3, at 899 ("An ideology is an interlinked set of normative beliefs that generate a comprehensive vision of a given subject. A methodology is an interlinked set of consciously articulated procedures that generates research and resolves substantive uncertainties in that subject." (citations omitted)).

24. G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1, 13 (1994). See also Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 159-60 (2006):

The modern American legal academy begins in 1870 with the appointment of Christopher Columbus Langdell as Dean of the Harvard Law School. Langdell's avowed mission was to transform American legal education into "scientific analysis" . . . . Ever since Langdell, the standard psychodrama of American legal education has revolved around the recurrent slaying of the Langdellian beast in the name of humanism, social science, or some other form of interdisciplinarity, only to be followed by the phoenix-like resurrection of elements of Langdell's original program of analyzing legal materials and cases (albeit now suitably leavened by a sprinkling of non-legal sources).

25. See Robert L. Nelson, *The Futures Of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 375 (1994) ("As late as 1971 women represented less than 10% of law students.").

least not openly homosexual), middle or upper-middle class<sup>26</sup> members of the legal academy. This worldview is not surprising because the scholarship conformed to the values and norms of its authors. It would be surprising if that were not the case.

Arguably, these values and norms dominated “mainstream” legal scholarship up until the 1970s and 1980s when feminist and critical race theories emerged. The emergence of these new, “dissenting” subdisciplines can be directly traced to the entry of women and ethnic minorities into the legal academy from the ranks of female students and students of color who were admitted to law schools in the decades after the passage of federal civil rights laws and in the shadow of the threat of litigation.<sup>27</sup> This statement is not intended to suggest that all scholarship prior to the emergence of feminist theory and critical race theory was perceived as safe scholarship then or is perceived as safe scholarship today. However, when contrasting a newly emerging subdiscipline to more established theoretical constructs, theories of safe and dissent scholarship indicate the need to use a plurality of methods for the evaluation of legal scholarship.

Safe and dissent scholarship do not exist in a vacuum. A discussion of safe or dissent scholarship requires a comparison, and it depends on who is doing the evaluating. The categorization of an article into safe or dissent scholarship from the perspective of a specific evaluator depends on several

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26. See Balkin & Levinson, *supra* note 24, at 157 (“[A]fter World War II . . . colleges and universities were transformed from bastions of the upper classes to venues where middle class students — and even occasional members of the lower classes — could seek an education that previously was rarely accessible to them.”).

27. See Cynthia Grant Bowman, Dorothy Roberts & Leonard S. Rubinowitz, *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 44 (2006) (“Law schools began to admit women in substantial numbers only after passage of the federal civil rights laws and under threat of litigation in the late 1960s and early 1970s.” (citation omitted)); Balkin & Levinson, *supra* note 24, at 167:

American feminism opened doors for a generation of women and minorities, who began to enter the law schools in far greater numbers in the 1970s and 1980s. Slowly but surely, women and minorities entered the ranks of the legal academy, bringing new approaches with them, as well as new additions to the legal canon.

See also Nelson, *supra* note 25, at 378:

Minority enrollment has climbed relatively steadily throughout the [last two decades], from 4.3% in 1969 to 13.1% in 1990. This contrasts with the far more explosive growth of women. And if we examine the composition of minority law students, we can see that a substantial proportion of the increase is due to the two minority groups who have the highest median family earnings among minorities: Asians and other Hispano-Americans. In the last five years African-Americans increased their presence in law schools from 4.8% to 5.1%. Mexican-Americans gained 0.2% and Puerto Ricans gained 0.1% from 1986 to 1990. Other Hispano-Americans moved from 1.5% to 1.9% of the enrollment. Asian-Americans grew from 1.9% to 3.3% in the same period. This last group alone represents 42% of the total growth in minorities in law schools over the last five years.

criteria. Identifying whether an evaluator will experience an article as safe scholarship or dissent scholarship requires an analysis of the assumptions of that particular evaluator. Even then, it is more likely that any given article falls somewhere on the safe-dissent continuum rather than at one extreme or the other.

Dissent scholarship is a broad category that often captures multiple theoretical and methodological movements in legal scholarship.<sup>28</sup> Dissent can be found in all legal subdisciplines, including corporate law, critical race theory, environmental law, feminist theory, international law, and tax law, among others. Dissent scholarship can include, for example, civil rights scholarship, critical legal studies, critical race theory, feminist theory, public choice theory, queer theory, various "law ands" scholarship that employs quantitative or humanistic methodologies, and other scholarship that, at one point in time or another, is not aligned with ideologies or methodologies that the reader values<sup>29</sup> or considers legitimate.<sup>30</sup> Many examples in this Article are drawn from critical race theory and feminist theory movements. However, a similar analysis could be done for other legal subdisciplines, such as those listed above.

Dissent in legal scholarship is the expression of disagreement with or rejection of established ideologies or methodologies or both, and is often coupled with the presentation of conceptual "alternatives."<sup>31</sup> A more spe-

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28. A theory of dissent scholarship could integrate the idea that it is possible to develop "configurations of identity that destabilize self/other, margin center dichotomies" and that binary oppositions are an artificial construct. Analouise Keating, *(De)Centering the Margins?: Identity Politics and Tactical (Re)Naming*, in *OTHER SISTERHOODS: LITERARY THEORY AND U.S. WOMEN OF COLOR* 24 (Sandra Kumamoto Stanley ed., 1998). Such a non-dualistic theory of dissent could provide a new basis for re-examining legal doctrines, scholarship, and the legal system as a whole.

29. Some interviewees noted that the exclusion of certain subdisciplines from the pages of general law reviews has resulted in the proliferation of specialized journals. Other interviewees noted that the relative ease or difficulty with which an author can publish an article in general law reviews can influence the research agendas of untenured professors toward subdisciplines that have a higher probability of being published in general law reviews. Interviews, *infra* note 66.

30. In this Article, dissent scholarship is suggested as a category that includes scholarship that Rubin would describe as different in either ideology or methodology or both from that of the evaluator, in this case law review editors. See generally Rubin, *supra* note 3. Groupthink and group dynamics also play a role in whether an evaluator will experience an article as safe scholarship or dissent scholarship. While an in-depth analysis of the influence of group dynamics on article evaluation is beyond the scope of this Article, it is implicit in the information asymmetries discussed *infra* in Part III of this Article, *Origins and the Tenacious Nature of Systemic Bias*.

31. The theory of dissent scholarship is informed by post-structuralist theories of discourse and draws from the "resistance culture," as defined by Edward Said, and "reconstruction jurisprudence," as defined by Angela Harris. See generally EDWARD W. SAID, *CULTURE AND IMPERIALISM* 209-20 (1993). See also Harris, *supra* note 22, at 763 (discussing the relationship between critical race theory and resistance culture).

cific discussion of scholarship as safe or dissent must identify both specific discourse communities<sup>32</sup> and specific time periods. Dissent appears in both substantive and technical forms.<sup>33</sup> Substantive dissent may include, for example, taking a position that constitutes a certain set of worldviews, values, or norms that are not held by the evaluator or the “mainstream” legal academy, such as outsider jurisprudence. Technical dissent can include, for example, narrative style and quantitative analysis.<sup>34</sup> In narrative style, the author writes from a first-person perspective. Narrative writing is inherently relative, and it deviates from traditional doctrinal scholarship, which purports to write from an objective, third-person perspective. Quantitative scholarship focuses on quantifying issues and then interpreting that quantification. Many scholars believe that quantitative methodology represents the extreme end of the objective-neutral end in the methodological spectrum.<sup>35</sup> With its emphasis on numbers, quantitative scholarship challenges the primacy of words in the legal academy. Humanistic methodology is the counterpart to quantitative analysis in that it emphasizes qualitative as opposed to quantitative methods.

One potential effect and, hopefully, benefit of dissent scholarship is its contribution to “transforming existing jurisprudence and political theory.”<sup>36</sup> Dissent proclaims difference from within and orients our attention toward

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32. For definitions and discussions of discourse communities, see generally MARTIN NYSTRAND, *WHAT WRITERS KNOW: THE LANGUAGE, PROCESS, AND STRUCTURE OF WRITTEN DISCOURSE* (1982); JAMES PORTER, *AUDIENCE AND RHETORIC: AN ARCHAEOLOGICAL COMPOSITION OF THE DISCOURSE COMMUNITY* (1992); JOHN SWALES, *GENRE ANALYSIS: ENGLISH IN ACADEMIC AND RESEARCH SETTINGS* (1990); and María Mar Rodríguez Romero, *Educational Change and Discourse Communities: Representing Change in Postmodern Times*, 6 *PEDAGOGY, CULTURE & SOC’Y* 47, 52 (1998).

33. What this Article terms substantive dissent is analogous to what Rubin, in *A Theory of Evaluating*, describes as a different ideology; and what this Article terms technical dissent is analogous to what Rubin describes as a different methodology. Rubin, *supra* note 3, at 899-901.

34. For example, the narrative has been the subject of a debate on rigor in legal academia. See generally Sheila R. Foster, *Symposium Critical Race Lawyering: Foreword*, 73 *FORDHAM L. REV.* 2027 (2005). For an initial excursion into this debate, see Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807 (1993); and Richard Delgado, *On Telling Stories in School: A Response to Farber and Sherry*, 46 *VAND. L. REV.* 665 (1993). See also *NARRATIVE AND THE LEGAL DISCOURSE: A READER ON STORYTELLING AND THE LAW* (David R. Papke ed., 1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 *CAL. L. REV.* 971 (1991) (examining the emergence of feminist narrative scholarship); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 *U. COLO. L. REV.* 683 (1992); *Pedagogy of Narrative: A Symposium*, 40 *J. LEGAL EDUC.* 1 (1990); *Symposium, Legal Storytelling*, 87 *MICH. L. REV.* 2073 (1989); Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 *RUTGERS L.J.* 79 (1991) (book review).

35. The accuracy of this belief has been questioned. See, e.g., Barbara Hanson, *Wither Qualitative/Quantitative?: Grounds for Methodological Convergence*, 42:1 *QUALITY & QUANTITY* 97 (2008).

36. See Harris, *supra* note 22, at 766.

the internal dynamics of society.<sup>37</sup> Dissent is the miner's canary of legal scholarship. It alerts us to the need to improve the legal atmosphere and, as a result, society as a whole. Dissent fosters a more complex and rigorous discourse. Engaging with dissent scholarship contributes to the process of exchange that underlies intellectual rigor and the creation of knowledge. To develop a more complex understanding of legal issues, editors and scholars should engage in a dialogue with editors and scholars whose perspectives, values, ideologies, and methodologies are different from their own.<sup>38</sup>

#### B. THE POTENTIAL FOR BIAS

Earlier, I posited that complaints by law professors about student editors' evaluation and selection of articles for publication might be smoke, indicating a fire. What might be fueling that fire? One possible source is some form of systemic bias in the article evaluation process. Perhaps student editors reject scholarship that represents ideologies or utilizes methodologies with which they are unfamiliar or uncomfortable. However, law professors' complaints notwithstanding, why should we assume that there is any systemic bias in article evaluation by law reviews? If certain forms of scholarship are dominant, perhaps it is simply because they are better and the complainers should just step up their game. Perhaps what I define as safe scholarship is simply "good old-fashioned," quality scholarship and what I define as dissent scholarship is merely poorly written, low-quality scholarship. This begs the question of whether there are viable alternative explanations for the dominance of certain forms of scholarship that do not hinge on their inherent superiority to scholarship that is less well-received in article evaluation by law reviews.

Individual biases, if shared by enough law review editors, are also a form of systemic bias. In the following paragraph, I apply the economic theory of network effects to develop a series of interconnected explanations for the dominance of any given form of safe scholarship at a particular time. These explanations illustrate alternative interpretations of systemic bias toward safe scholarship that are not dependent on qualitative superiority alone.

The application of the economic theory of network effects, which will be discussed in greater detail in Section III.C., *Network Effects*, suggests explanations for a systemic bias. First, the more scholars there are who conform to contemporaneous standards for safe scholarship, the more attractive it is for other scholars. Second, the more legal scholars write arti-

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37. See ELENI COUNDOURIOTIS, *CLAIMING HISTORY: COLONIALISM, ETHNOGRAPHY, AND THE NOVEL* 20 (1999).

38. See Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 857 (1996).

cles that conform to contemporaneous standards for safe scholarship, the more likely it is that law reviews will continue to value and publish safe scholarship. Third, the more law reviews publish articles that conform to contemporaneous standards for safe scholarship, the more useful it becomes for legal scholars to acquire skills associated with safe scholarship. Fourth, the more scholars acquire the skills associated with safe scholarship, the greater the incentive is for legal scholars to produce scholarship that is compatible with contemporaneous safe scholarship. Fifth, the more safe scholarship is written and published, and the more law students, lawyers, and academics are trained in the ideologies and methodologies of contemporaneous safe scholarship, the more inexorable the conclusion that one "must" adhere to the standards of whatever has achieved the status of safe scholarship at any given time.

These potential explanations for the dominance of safe scholarship suggest that it is not completely unimaginable that a systemic bias toward safe scholarship might exist and that such a bias might not solely be due to qualitative superiority. This is not surprising since scholarship analyzing the biases of legal scholars is not new. If biases influence law professors, it follows that the students that they teach and train may also be influenced by biases.

The potential for bias in article evaluation by law reviews can focus our attention on the responses, or lack thereof, to expanding pluralism in legal scholarship. It often takes a crisis to push society to change,<sup>39</sup> and increasing pluralism in legal scholarship can arguably be characterized as a crisis. This is because it threatens "not only traditional methods of inquiry, which emphasize the legal forms, but also . . . belief[s] in a distinct 'legal expertise' based on a distinct specialized knowledge."<sup>40</sup> This "crisis" is an opportunity to examine and refine standards of evaluation for law review articles by student editors.

However, one might also question the validity of the claim that there is a "crisis" that requires a response. Where is the evidence that bias is affecting article evaluation by law reviews? Several scholars laid the groundwork for this argument.<sup>41</sup> Read together, their work provides the foundation for a colorable argument that there is systemic bias in article evaluation by law reviews.

One example of bias in legal scholarship was identified approximately twenty-five years ago by Richard Delgado. In his 1984 article, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature* ("The Im-

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39. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493, 606 (1996).

40. Kissam, *supra* note 1, at 254.

41. See, e.g., Bowman et al., *supra* note 27; Christensen & Oseid, *supra* note 19; Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Nance & Steinberg, *supra* note 19; Rubin, *supra* note 3.

perial Scholar”), Delgado analyzes quantitative and qualitative citation practices of white civil rights scholars and identifies a bias in the footnoting practice of civil rights scholarship. Specifically, Delgado identifies a scholarly tradition that he describes as “white scholars’ systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship.”<sup>42</sup> Further, Delgado argues that this “tradition causes bluntings, skewings, and omissions in the literature dealing with race, racism, and American law.”<sup>43</sup> The same scholars who participated in the tradition Delgado identifies are also law professors, and it is not unthinkable that in their role as teachers they may have imparted some of the biases, whether conscious or unconscious, that they themselves held. Naturally, this Article is not suggesting that law students unquestioningly accept and recreate all that they see and hear. However, it does assert that they are influenced by their environments in one way or another.

Admittedly, much has changed since Delgado wrote *The Imperial Scholar* a quarter of a century ago. Among other things, women and minorities have entered law schools and the legal academy in unprecedented numbers. To get a rough sense of whether ethnicity might still be correlated with representation in the legal marketplace of ideas, I asked my research assistants to create a list of the articles published in selected top ten law reviews in the past two years.<sup>44</sup> The purpose was not to prove whether ethnicity is correlated with exclusion from top ten law reviews, but rather to see whether this could be immediately ruled out. Most of the authors in the sample were white and male. However, this is not to suggest that this list proves a correlation between ethnicity and publication, or lack thereof, in top ten law reviews. One alternative explanation might be that a majority of law professors are white and male and, therefore, the sample collected simply reflects the proportional representation of white male professors in the law professor population. Nonetheless, based on these results, it was not possible to quickly and easily rule out a correlation between ethnicity and exclusion.

One example of an in-depth analysis of the exclusion of scholarship addressing race and gender is Cynthia Grant Bowman, Dorothy Roberts, and Leonard Rubinowitz’s evaluation of the past one hundred years of the contents of the *Northwestern University Law Review* (“*Northwestern*”). In

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42. Delgado, *supra* note 41, at 566.

43. *Id.* at 573.

44. Although it is a rough and imperfect method, the gender and ethnicity of the authors were determined by using a combination of the AALS Minority Section list and personal contacts. While I do not claim that the results are comprehensive or even robust, the gender trend of the results is supported by a recent empirical study by Minna J. Kotkin. See generally Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the ‘Top Ten’ Law Reviews* (Brooklyn Law School, Legal Studies, Aug. 17, 2008), available at <http://ssrn.com/abstract=1140644>.

their 2006 article, *Race and Gender in the Law Review*, the authors analyze the article selection practices of *Northwestern* over time.<sup>45</sup> In the 1980s, after women began entering the legal academy, many schools of feminist thought developed.<sup>46</sup> However, Bowman, Roberts, and Rubinowitz's research shows that *Northwestern* published only one feminist legal theory article during the 1980s.<sup>47</sup> This supports an argument that feminist legal theory during that period could be accurately described as dissent scholarship, at least within the pages of *Northwestern*.

Another area of legal scholarship that emerged as the academy became more diverse was scholarship addressing issues faced by gay, lesbian, bisexual, and transsexual persons, and "theorizing about gender from a queer perspective."<sup>48</sup> However, although interest in these issues grew in the legal academy during the 1980s and 1990s, only two student case notes, and zero articles, were published in *Northwestern* in the eighteen years from 1980 to 1998.<sup>49</sup> The lack of articles published despite growing interest in the academy supports an argument that scholarship addressing queer issues at that time could also be described as dissent scholarship.

Critical race scholarship experienced similar treatment. In one hundred years, *Northwestern* published only one article, two essays, and three book reviews in this subdiscipline.<sup>50</sup> Even if one discounts the first seventy years because critical race theory did not emerge until the 1980s, this is still a glaring omission of critical race scholarship. Although this fact alone is not determinative, it strongly supports an argument that critical race theory could be accurately described as dissent scholarship, at least within the pages of *Northwestern*.

Naturally, bias based on gender, ethnicity, race, or sexual orientation as a subject of scholarly inquiry represents only some of the areas where bias might affect the article selection process. We might also return to the question of whether this bias is only represented among student editors. Edward Rubin's discussion of bias in the evaluation of legal scholarship in his 1992 article, *On Beyond Truth: A Theory for Evaluating Legal Scholarship* ("A Theory for Evaluating"), explores the bias of legal academics more generally.<sup>51</sup> An application of Rubin's discussion of bias to student-run law reviews suggests that where there are idiosyncratic reactions<sup>52</sup> on an

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45. Bowman et al., *supra* note 27, at 27-28.

46. *Id.* at 44.

47. *See id.* at 27, at 48-49 (discussing the exclusion of feminist legal theory from *Northwestern* in the 1980s).

48. *Id.* at 55.

49. *Id.* at 55-56.

50. *Id.* at 61.

51. *See* Rubin, *supra* note 3.

52. *Id.* at 896.



editor-by-editor basis that are likely to "tend in one particular direction," they could rise to the level of institutional bias that systemically influences article evaluation by law reviews.<sup>53</sup>

There is a wide range of support for a claim that systemic bias affects article evaluation. In addition to earlier work, like that of Delgado and Rubin, more recent work, like that of Bowman, Roberts, and Rubinowitz (discussed above), has been published with empirical studies on article selection. While researching and writing this Article, I supplemented the published data with interviews with law professors from a variety of fields including business, tax, feminist theory, and critical race theory, as well as with current and former law review editors from law schools in various tiers. The empirical studies, my own observations, and the interviews I conducted suggest that bias may be influencing article evaluation in a systemic way. An analysis of the evidence of bias in the evaluation of law review articles could independently fill an entire law review article. This section discusses selected examples to support the assumption of the potential for bias made in this Article.

Leah M. Christensen and Julie A. Oseid offer empirical evidence that sheds light on the role of bias in the evaluation of scholarship in their 2007 article, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power – Student Editors*.<sup>54</sup> Christensen and Oseid's article analyzes data from sixty-one completed surveys.<sup>55</sup> According to the authors, each tier of law schools was relatively evenly represented.<sup>56</sup> Among other things, Christensen and Oseid find that among their survey respondents, article selection was often heavily influenced by criteria other than the substance of the article. These other criteria include the school where the author teaches, where the author graduated from law school, the number of the author's previous publications, where the author previously published, and the author's practice experience.<sup>57</sup> These results indicate that the evaluation of articles is influenced by criteria that are not inherently correlated with the substance or quality of an article. The data collected by Christensen and Oseid further indicates that article evaluation is influenced by criteria that are not even related to the editors' own evaluations of the substance and quality of articles.

One might wonder why student editors, who have the opportunity to contribute to shaping and influencing legal thought, might so willingly cede that power by choosing not to rely on their own judgment. Perhaps law review editors are satisfied with the system as it stands, and they are making

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53. See Rubin, *supra* note 3, at 897-98.

54. Christensen & Oseid, *supra* note 19.

55. *Id.* at 187.

56. *Id.*

57. See *id.*

a judgment call. It is possible that they are consciously and actively choosing to rubberstamp the decisions of professors and other law review editors, whom they have never met, based on a firm belief in the system. Although this explanation is possible, another explanation for the abdication of their powers may lie in unconscious bias, the lack of a satisfactorily rigorous alternative method of evaluation, or a combination of the two.

On the one hand, this data indicates that editors are considering the potential influence and effects of the scholarship they review. On the other hand, it also suggests that their understanding of how a particular subdiscipline fits into the larger landscape of American law and society may be too insufficient or incomplete to allow them to make informed substantive evaluations. From a substantive perspective, Christensen and Oseid's study also shows that the selection process is influenced by the title and topic of the article. For example, they find that trendy topics, "narrow topics such as tax [and] civil procedure," and "pragmatic topic[s], such as professional responsibility and law school pedagogy," are much less likely to receive an offer for publication.<sup>58</sup>

Finally, the data collected by Christensen and Oseid suggests that a significant majority of articles are evaluated and rejected within a period of five to thirty minutes.<sup>59</sup> The current and former law review editors interviewed for this Article confirmed the speed with which most law review articles are evaluated.<sup>60</sup> On some law reviews, this process is known as "triaging." Given the speed with which most articles pass through the triaging stage, it seems likely that much of article evaluation is and will continue to be based on some version of a gut reaction, unless editors have a clear set of criteria with which to evaluate articles.<sup>61</sup>

If first impressions play a primary role in the evaluation of articles, then the assumptions that inform these first impressions take on paramount

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58. Christensen & Oseid, *supra* note 19, at 196. Editors' perception of, for example, tax scholarship as narrow becomes questionable when contrasted with a book review by William J. Turner, a prominent tax scholar, who points out the central role of tax reform on the national political stage. William J. Turner, *Federal Income Tax Anthology*, 74 TAX NOTES 1343, 1343 (1997) (book review) (discussing how "the current interest in the topic of taxation in major law reviews has plunged to an all-time low" despite the fact that "the issue of tax reform has moved to center stage in the national political debate," and exploring related empirical data).

59. Christensen & Oseid, *supra* note 19, at 196.

60. *Id.* at 198-99. The current and former editors interviewed who were on law reviews that receive large numbers of submissions stated that a large number of articles are rejected very rapidly after a quick glance to determine subject matter and quality. The editors interviewed on law reviews that receive a comparatively smaller number of submissions reported differing practices varying from a full read for every article submitted to an initial filter for quality and then a full read for all articles that met a minimum quality threshold. Interviews, *infra* note 66.

61. See generally MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005) (discussing "snap judgment" in detail).

importance. It is also in these vital moments of first impression that unquestioned bias can take on a significant but almost invisible role. Often, the first read of an article in the triage stage is done by only one editor. This makes sense because many law reviews are deluged with vast numbers of articles, and this has only increased with the advent of electronic submissions.

However, the speed of the process and the possible lack of a second reader at the initial stage of evaluation beg the questions of whether student editors have a process to call their own biases and assumptions into question, what that process is, and whether it is robust. Of course, these questions assume that law review editors are not merely trying to further their own opinions, but rather take their position seriously and attempt to do the best job they can. This Article assumes that law review editors fulfill their positions with an earnest and sincere intent.

Further, this is not a suggestion that editors should discontinue the practice of quickly rejecting articles that are of objectively poor quality. (By this, I refer to articles that are poorly written or insufficiently researched, repeatedly use incorrect grammar or punctuation, and have citations that are incomplete in substance and form.) Questioning the article evaluation process does not mean that substantive or technical standards should be abandoned. Exploring and understanding theoretical and methodological pluralism should not result in lower standards but rather in more sophisticated and suitable standards.

Jason P. Nance and Dylan J. Steinberg's 2008 article entitled, *The Law Review Article Selection Process: Results From a National Study*, support the conclusions of the Christensen and Oseid study.<sup>62</sup> In this article, Nance and Steinberg analyze 191 responses from 163 journals. The results of the study confirm many of the results of the Christensen and Oseid study, such as the weight placed by student editors on the frequency of publication, placement of the author's previous articles, and rank of the law school at which the author is employed.<sup>63</sup> Their study is more extensive and highlights, among other things, the importance of more substantive criteria, such as whether the editor believes that the article fills a gap in the literature or whether the topic would interest the general legal public.<sup>64</sup> However, the attributes of the author rather than those of the article still play a dominant role in article selection.<sup>65</sup> Their conclusions support the stories told by the professors and editors I interviewed.

In addition to reviewing recent scholarship on article selection, I also

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62. Nance & Steinberg, *supra* note 19.

63. *Id.* at 583.

64. *Id.*

65. *See generally id.*

interviewed law professors and law review editors.<sup>66</sup> Convincingly, all of the interviewees had a similar story to tell: they felt that there was bias in article evaluation by law reviews. It is worth noting here that many of the professors interviewed were on law review as students and so have insight

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66. Interviews with Law Professors and Law Review Editors (2005-2008) [hereinafter Interviews]. The interviewees requested that I omit information that would identify them. Therefore, to protect their confidentiality, the descriptions of the interviewees, as well as the interviews, are drawn with broad brush strokes.

Over a period of four years, I interviewed a total of thirty law professors and current and former law review editors. I used this qualitative research method as a holistic method to develop an impression of the big picture beyond my own observations and experiences as an Articles Editor on the *California Law Review*, Executive Editor on the *Berkeley Journal of International Law*, and Managing Editor of the *African-American Law & Policy Report* (now the *Berkeley Journal of African-American Law & Policy*). In later stages, the interviews helped to develop the story behind the results reported in the empirical studies published by Christensen and Oseid in 2007, and Nance and Steinberg in 2008. See Christensen & Oseid, *supra* note 19; Nance & Steinberg, *supra* note 19.

The interviews were conducted as unstructured interviews. They were conversational and free-flowing. I informed the interviewees of the reason for the interview and the article that I was writing. I asked standard background questions such as age, education, law review experience, etc. I asked open-ended questions about the interviewees' experiences on one or both sides of article evaluation and selection, as well as their opinions about the process of article evaluation by law reviews, what values they believed were important to apply to the evaluation of scholarship, and how they felt about article evaluation. While I asked interviewees to differentiate between first-hand experiences and second-hand knowledge, I did include both in the interview questions. I did not ask all of the interviewees the same questions, but rather adjusted my questions according to how each interviewee responded. However, I made a conscious effort not to bias the interview results.

Interviews were conducted in person, by telephone, and a couple by email. Some interviews were conducted in one sitting while others were conducted over a series of days. Each interview lasted at least fifteen minutes. Most interviews lasted approximately thirty minutes, and some interviews lasted several hours. The interviewees discussed both their own and observed experiences. In some cases I sought out the interviewees, and in other cases the interviews resulted from a moment of opportunity.

Among both the professors and editors interviewed, there was a relatively even mix of ages; the interviewees were more likely to be white than not; women made up approximately two-thirds of the interviewees; and only a couple of the interviewees were openly gay or lesbian. The law professors represented a wide range of legal subdisciplines, including constitutional law, corporate law, critical race theory, employment law, feminist theory, international law, and tax law, among others. The majority of the law professors had attended law schools ranked in the top ten in the *U.S. News and World Report* rankings. The law professors interviewed included scholars at all stages of their careers. The current and former law review editors represented schools from all regions of the country. The majority of the law review editors interviewed attended or had attended law schools consistently ranked in the top fourteen in the *U.S. News and World Report* rankings. Although there is a good mix among the interviewees, this sample is not and was not intended to be robustly representative.

I interpreted the results of the interviews using a hermeneutic methodology. I looked at the interrelations between all of the interviewees' statements and identified contradictions and consistencies. I used the interviews to develop a fuller understanding of the big picture. However, these interviews do not preclude a large-scale, statistically robust study at a later date.

into the process from both sides. Their perceptions of biases differed in terms of targets, time periods, and effects. Although their experiences differed, the stories they told overlapped, and each confirmed aspects of the others. In addition, each person I interviewed was aware of other people who had observed or perceived similar expressions of bias. This evidence, although anecdotal, is the smoke that supports a need to look for an underlying fire.

Assuming that the sample of law professors and law review editors interviewed, and the data collected for the recently published empirical studies is in any way representative or indicative of a systemic weakness in article evaluation by law reviews, it seems possible that one source of the complaints discussed above may be systemic bias. This Article assumes that there is a potential for bias in the article evaluation process. The aim of this Article is not to prove the existence of bias but rather to argue that this is a viable assumption, to develop a theoretical explanation for how such bias may develop, and to delineate ways to minimize the effects of this bias. Given the evidence from the empirical studies combined with my own interviews, it seems that the assumption that there is a potential for bias in the article evaluation process is a fair one.

### III. ORIGINS AND THE TENACIOUS NATURE OF SYSTEMIC BIAS

A systemic bias toward safe scholarship skews legal discourse. This bias has broader implications that go beyond individual editors, authors, and law reviews. On a larger scale, perspectives, ideologies, methodologies, and subdisciplines that do not conform to the norms and standards of safe scholarship are more likely to be systematically excluded from the status- and reputation-bearing discourse found in the pages of law reviews. Therefore, merely satisfying an existing bias is insufficient,<sup>67</sup> especially when the bias may contribute to an inability to accurately evaluate scholarship. As a result, there may be a tendency to overvalue safe scholarship and undervalue dissent scholarship. Whether this is willful or unintentional, the result is an even playing field. The choice of what kind of scholarship to publish inevitably influences the legal discourse and can contribute to or mitigate bias.<sup>68</sup>

In *A Theory for Evaluating*, Rubin sets out criteria that can be used in the evaluation of legal scholarship to mitigate the effects of bias.<sup>69</sup> However, Rubin's article focuses on evaluation by legal scholars rather than by student editors. Successfully applying Rubin's theory of evaluation to article evaluation by law reviews and making it easy to implement on a day-to-

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67. CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 5 (1997).

68. *Id.*

69. See generally Rubin, *supra* note 3.

day basis requires adjustments to account for the differences between law review editors and legal scholars. One significant difference is the discrepancy in the level of accumulated knowledge of legal theory, prior legal scholarship, and the direction of legal discourses.

Economic theory offers several useful ways to think about where biases for safe scholarship and against dissent scholarship come from and why it is difficult to reduce the effects of systemic bias. These theories can be applied to the production and dissemination of information and knowledge, which are key elements of a scholarly discourse. Specifically, this section applies insights from economic theories of information asymmetries, switching costs, and network effects.<sup>70</sup>

Student-run law reviews and journals constitute an important and influential forum in the legal marketplace of ideas. The scholarship published in law reviews plays a role in shaping both jurisprudential thought and the legal climate.<sup>71</sup> Judges, practitioners, professors, students, and policymakers look to scholarship published in law reviews as a source of discussion about the law.<sup>72</sup> Scholarship and, in no small part, article placement play an important role in the academic employment market through their potential to influence hiring and promotion decisions.<sup>73</sup> Article placement — the law review in which an article is published — has an informational function in the legal academy. Publication in a particular law review signals that the editors of that law review found the article to be worth publishing and, hopefully, contributing something important to the legal discourse.<sup>74</sup> By choosing which articles will be offered a slot for publication, law review editors are also choosing to offer the status of their law review to those articles.

Publication in a particular law review provides information about which editors at which schools saw sufficient merit in the article and the arguments it espoused to select it for inclusion in their publication. The choices editors make about which perspectives, ideologies, and methodologies are published in their law review can elevate scholarship with similar perspectives, ideologies, and methodologies. Unequal hurdles in the article evaluation process can thus influence academic promotion and tenure decisions.<sup>75</sup>

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70. See generally JOSEPH E. STIGLITZ, *ECONOMICS* (1997); George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, Q.J. ECON., 488, 491 (1970); A. Michael Spence, *Job Market Signaling*, Q.J. ECON., 355, 361 (1973) (discussing the role of information in markets).

71. Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity of America's Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 59 (1995).

72. *Id.* at 60.

73. Rubin, *supra* note 3, at 893.

74. See Spence, *supra* note 70, at 357-59.

75. See, e.g., Philip F. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 159 (2000) (stating that in any tenure decision, a tenure candidate's scholarship is more important than the candidate's teaching, collegiality, and professional service).

Following in the tradition of law and economics scholars, this Article utilizes the tools of economic theory and analysis in a non-market context and does not maintain the existence of an actual market. Section III.A., *Information Asymmetries*, applies theories traditionally used to establish the existence of a market failure in an economic context.<sup>76</sup> Sections III.B., *Switching Costs*, and III.C., *Network Effects*, analyze the ways that bias is maintained in the law review marketplace of ideas. Insights from critical race theory are employed to develop and to add depth to this law and economics analysis. The overarching argument of this section is that the potential for bias in article evaluation is systemic and persistent. Therefore, a concerted effort at an institutional level will be necessary to minimize the negative effects of bias in article evaluation by law reviews.

#### A. INFORMATION ASYMMETRIES

If we assume a level playing field, we should expect that the article evaluation process results in publication of articles whereby the relative "value" of the article corresponds to the relative hierarchical status of the law review in which it ultimately places.<sup>77</sup> However, this notion assumes that the hierarchical status accorded to law reviews is meaningful — an assumption that reasonable minds might question. It also assumes that the editors are impartial and that the hierarchal standing of law reviews corresponds to the relative value of individual articles.<sup>78</sup>

An impartial editor would be "presumed to weigh the relative merits without regard to status or historical context and determine the outcome."<sup>79</sup> However, as the studies by Kotkin, Nance and Steinberg, Christensen and Oseid, and Bowman, Roberts, and Rubinowitz have shown, editors do consider status and historical context. This phenomenon has the potential to skew the decisions made by editors in the article evaluation process toward safe scholarship.

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76. See John O. Ledyard, *Market Failure*, in 5 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 300, 300-03 (Steven N. Durlauf & Lawrence E. Blume eds., 2008).

77. This in part underlies the purpose of the expedite process in which scholars alert higher-ranked law reviews to the potential placement of an article in a lower-ranked law review. In the expedite process, an author who has received an offer for publication will contact the editors at law reviews that are more highly ranked or otherwise are a more preferable publication placement in the author's eyes. The author informs the other law reviews that they have received an offer and requests that the other law reviews "expedite" the review of their article. Specifically, they request that the other law reviews complete their evaluation process by the decision deadline of the law review that made the initial offer. A discussion of the "gaming" process associated with expedites is beyond the scope of this Article.

78. It also assumes that the hierarchical rankings of law reviews are meaningful in the way that they are used. However, examining the accuracy of this assumption is beyond the scope of this Article.

79. Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1261 (2004).

Student editors evaluate scholarship with the goal of selecting articles for publication. The recent empirical studies discussed above have advanced our knowledge of the criteria that editors often use when choosing articles for publication. However, the question that remains unanswered is why the criteria related to the authors are given more weight than criteria related to the articles themselves. In this section, I argue that students focus on author criteria rather than article criteria because of a paucity of relevant information necessary to engage in sophisticated article evaluation. Students turn to author criteria as a proxy because they do not know how to accurately and efficiently evaluate legal scholarship.

At this point, some might say that there is nothing new in an argument that students are ill-equipped to evaluate legal scholarship and we should simply abolish student-run law reviews and replace them with peer-reviewed journals. However, before we throw the baby out with the bathwater, we should recall that law reviews offer the benefit of an unending stream of fresh readers who perpetually represent the most recent generation — who will inherit our society. Their fresh eyes can help us avoid the extremes of an asked-and-answered mentality. Further, peer reviewers are also human and therefore may also find it difficult to be impartial. The difference is that peer reviewers have more information and more sophisticated evaluation tools. Peer reviewers may also become entrenched, whereas each year there is a new group of student editors. Therefore, I argue that a best-of-both-worlds scenario would include retention of the student-run law review model but promote processes that help student editors tap into relevant information and develop more sophisticated evaluation tools. To achieve this goal, we need to first understand the hurdles facing student editors so we can craft tailored measures. Insights from economic theory can help shed some light on the criteria that influence choices made by law review editors in the article evaluation process.<sup>80</sup>

Making choices is the essence of economics.<sup>81</sup> Information exerts a strong influence on choice in the economic context and on the evaluation of legal scholarship. In economics and in article evaluation, information asymmetries exist when one party has more or better information than another party.<sup>82</sup> In the law review context, an information asymmetry can

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80. For example, some of the insights in public choice theory resulted from the application of economic theories and methodologies to political behavior. William F. Shughart II, *Public Choice*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, available at <http://www.econlib.org/library/Enc/PublicChoice.html> (last visited Feb. 1, 2009).

81. JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK, at xv (2007). See generally KENNETH JOSEPH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963), for a detailed discussion of the role of choice in economics. In addition to his contributions in the area of decision theory, Kenneth Arrow, together with Sir John Hicks, received a Nobel Prize in economics for his work in the areas of general equilibrium theory and welfare theory.

82. STIGLITZ, *supra* note 81, at xiv.



cause irrational or unrelated criteria to influence the evaluation of articles. Although some information asymmetry is inevitable, reducing information asymmetries generally leads to better choices because those making the decisions are able to make more informed choices. This section examines some sources of information asymmetries in the article evaluation process.

The obvious asymmetry lies in the nature of students evaluating the work of professors. Law professors who are writing in their area of expertise have accumulated knowledge through years of reading relevant scholarship, attending conferences, and analyzing legal issues. Even when professors are writing in a subdiscipline that is new to them, they generally have knowledge of related or relevant subdisciplines that they can bring to bear. Thus, the authors of legal scholarship almost always have more knowledge about the subject of their article than the law review editors who are selecting, editing, and publishing their scholarship.<sup>83</sup>

In researching and writing an article, authors will have read the articles cited in their article as well as others that were not included in the citations. Law review editors simply have not had the time to develop the same level of knowledge of legal issues and relevant scholarship as a legal scholar who has dedicated the time required to write an article. In addition, law professors or practitioners may also bring knowledge to their scholarship that has its roots in their experience as practicing attorneys, which law review editors do not have since they, by definition, are not yet attorneys.

Even assuming that there is an information asymmetry between most authors of legal scholarship and law review editors, this alone is not likely to lead to a systematic bias for one type of legal scholarship over others.<sup>84</sup> Instead, this arguably results in an inability to accurately evaluate legal scholarship that applies more or less equally to all law review editors. Because law review editors are arguably all similarly affected by this knowledge-based asymmetry, it seems likely that this affects safe and dissent scholarship equally.

However, even though all editors generally know less about the subject of any given article than all authors, the degree of asymmetry varies from article to article. Thus, safe scholarship is likely to suffer from a lesser degree of asymmetry than dissent scholarship. If editor A only understands twenty-five percent of article X, but understands fifty percent of article Y, this may cause her to value article Y higher or at least spend more time on evaluating article Y. In other words, the level of comfort that an editor feels about an article has an effect on her evaluation of that article. The

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83. One exception to this is where the law review editors hold doctorates, in which case the information asymmetry may tip in favor of the law review editor.

84. However, knowledge-based asymmetries help explain why students may use author criteria as a proxy for article criteria, for example, using the prestige of the author's school as a proxy for article quality.

following subsections discuss subcategories of knowledge-based information asymmetries that are likely to differ from student to student: education-based and experience-based asymmetries. These subcategories highlight differing sources of students' relative knowledge. While they cannot be split neatly from one another because they inform each other in inextricable ways, it is useful to differentiate between them for the purpose of identifying ways to minimize individual and systemic bias.

### 1. Education-Based Asymmetries

Education-based information asymmetries can stem from a range of factors. Students may have studied history, philosophy, or political science as undergraduates. They may have entered law school after having earned advanced degrees as economists, engineers, or medical doctors. Although pre-law school education is not irrelevant, this Article focuses on the asymmetries that stem from legal education. Legal education is within the purview of the legal academy and it is an area that law professors and law students have the potential to influence.

One reason that education-based information asymmetries exist in article evaluation by law reviews is because legal education is generally not structured with the goal of teaching students how to read and evaluate legal scholarship.<sup>85</sup> Although learning to think like a lawyer helps students develop their analytical skills, it does not necessarily give students a solid foundation in the history of legal theory or current trends in jurisprudential thought. In law school, students take different classes and develop varying levels of familiarity with different schools of jurisprudential thought. The emphasis on specific legal subdisciplines and areas of jurisprudence varies from school to school. This is based in part on faculty expertise as well as other curricular criteria. Additionally, editors may acquire knowledge, whatever the depth, of some areas of law, such as constitutional law, but little or no knowledge of others, such as bankruptcy ethics or critical legal studies.

Prior knowledge acquired through legal education strongly influences how a editors receive and evaluate an article.<sup>86</sup> Editors tend to have a bias toward scholarship addressing issues with which they have some familiar-

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85. See, e.g., David T. ButleRitchie, *Situating "Thinking Like a Lawyer" Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 29 (2002-2003) ("The notion that a legal education is meant to convey to students an idea of how to 'think like lawyers' is central to the modern legal academy."); Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 480 (2000-2001) (describing the purpose of legal education as training students "to think like a lawyer" and be adept at legal analysis). Cf. Menkel-Meadow, *supra* note 4, at 559 (arguing that "at least one purpose of legal education is the production of knowledge about law and its practice through study and research into 'new' ideas about law").

86. RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* 34 (2005).

ity through their law school education — safe scholarship. This is not surprising. As a law student, one might logically conclude that if particular ideologies or methodologies are important, they will be integrated into the law school curriculum. Such conclusions could also contribute to the relative strength of biases stemming from education-based asymmetries. Thus, education-based asymmetries have the potential to contribute to a bias for safe scholarship over dissent scholarship. Taken to its logical conclusion, this analysis suggests that legal education plays a role in determining where various subdisciplines and methodologies fall on the safe-dissent continuum.

## 2. Experience-Based Asymmetries

Experience-based information asymmetries stem from the students' life experiences. Some students go straight to law school after leaving their undergraduate institutions and do not have substantial work experience when they begin law school. Others attend law school after having worked for many years as a teacher, doctor, or real estate agent. Some law students grew up in geographic regions where there was one predominant ethnic group, while others grew up in multicultural metropolises. Some law students grew up in a household with one mother and one father. Others grew up in households with one parent, two same-sex parents, or another non-traditional family arrangements. Some students lived in communities where everyone owned one or more cars, while others lived where everyone took public transportation. These are only a few examples, and the possibilities and combinations are endless.

Experience-based information asymmetries result from editors' individual and collective experiences or a sense of belonging to particular discourse communities. A discourse community is "a group of individuals who share a common language, common knowledge base, common thinking habits, and common intellectual assumptions."<sup>87</sup> Discourse communities are not, however, monolithic. There are also sub-discourse communities within discourse communities.<sup>88</sup> The experiences, both personal and professional, of law review editors and the discourse communities to which they belong influence their individual and collective understandings and articulations of legal analyses.<sup>89</sup>

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87. MCKINNEY, *supra* note 86, at 14.

88. *See id.* ("While these sub-discourse community members all share things in common with each other (because they're all members of [a common] discourse community) they also have unique attributes and means of expression not shared by individuals outside their own sub-community. We are all members of numerous "discourse" communities and sub-communities.").

89. *See* Ross, *supra* note 38, at 857:

[An] examination of rape law supports the claims of feminists and critical race scholars that members of a dominant community who are already part of the established legal community cannot expect to understand, either

It is very challenging to process information about a new topic without a context in which to locate the new information.<sup>90</sup> Thus, law review editors face additional hurdles that correlate to the magnitude of difference between the article that they are evaluating and their own experiences. This challenge also explains why the first semester of law school is jarring to many law students. In her book, *Reading Like a Lawyer*, Ruth Ann McKinney argues that “[w]ithout a proper schema, students can’t process information correctly.”<sup>91</sup> If editors’ experiences have not given them a “proper schema” within which they can process the substance of a given article, then they will be unable to accurately evaluate the article.

As a result of experience-based asymmetries, law review editors tend to have a bias for scholarship that complies with the criteria and standards with which their own experience and discourse communities have familiarized them (safe scholarship).<sup>92</sup> They may overlook or misinterpret the influence, effect, and role of factors like gender, race,<sup>93</sup> or socio-economic status when it is not within their own personal experience. For example, lack of an accurate and deep understanding of the role of race substantially increases the hurdles to accurately evaluating scholarship addressing issues of race and may, for example, lead to a bias for “race-neutral” scholarship. Thus, journals that focus on women’s issues where the membership is all women (gender homogeneity), or that focus on issues of importance to African Americans where all of the members are African American (ethnic homogeneity) may tend to promote perspectives that are consistent with their own experiences rather than those that call them into question.

Editors may act in a way that Ian F. Haney López has described as “script racism” because they do not critically examine their own assumptions and values.<sup>94</sup> When practicing script racism, editors rely on the institutional norms, rules, and behaviors that have been established, developed,

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automatically or solely through the prism of their own experiences, the many ways their view of reality is shaped and sometimes distorted by their own perspective.

90. MCKINNEY, *supra* note 86, at 17.

91. *Id.* at 17 (“[A schema is] a cluster of information that we hold in our mind about a subject. It informs our perceptions, our assumptions, and our processing of information.”).

92. Here it should be noted again that the specifics of safe scholarship will likely differ from editor to editor and from editorial board to editorial board. Safe scholarship and dissent scholarship are not bright-line categories, and specific ideologies or methodologies may be located somewhere on a continuum with safe scholarship at one end and dissent scholarship at the other.

93. Ian F. Haney López defines a “‘race’ as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry.” Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994).

94. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1827 (2000).

and handed down over years without reflecting on their actions.<sup>95</sup> They may also practice script racism when they unquestioningly use normative terminology to describe scholarship without reflecting on underlying norms and values.<sup>96</sup> Such terminology includes novel, original, rigorous, well-written, insightful, outstanding, engaging, enjoyable, strong, solid, comprehensive, weak, uninteresting, bland, lackluster, confusing, mechanical, and routine. These are subjective criteria that allow law review editors to influence the valuation of legal scholarship. However, what one editor means when they use these terms may differ dramatically from another editor who has a different educational or experiential background.<sup>97</sup> It is, however, not the use of these terms that is at issue, but rather their use without reflection on the perspectives, ideologies, methodologies, values, and norms that they perpetuate.

This scripted evaluation is often limited by the ideologies and methodologies that are familiar to and (over-)valued by the specific editor (safe scholarship) and thus can reinforce gender, racial, socio-economic, or other hierarchies. The combination of scripted evaluation and experience-based asymmetries limit editors' abilities to evaluate new or unfamiliar methods and approaches to legal scholarship.<sup>98</sup> Information asymmetries affect all law review editors regardless of their ethnic backgrounds, life experiences, or sense of belonging to particular discourse communities.

The effect of education-based and experience-based information asymmetries is that each law review editor on any given law review will be more familiar with and know more about some substantive areas of the law, scholarly subdisciplines, methodologies, writing styles, or discourse communities, and related assumptions, than they know about others. Both of these subcategories of knowledge-based information asymmetries skew law review editors' evaluation of scholarship, whereby they are likely to have a

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95. See Haney López, *supra* note 94, at 1827. Script racism occurs:

[W]hen persons enforce racial status hierarchy through an unrecognized reliance on racial institutions and without giving any thought to race, while path racism occurs when persons enforce racial hierarchy after carefully considering, and rejecting, the idea that race informs their actions. . . . [I]n assessing the ability of institutional racism to continue even in the face of direct challenges to discriminators, the script/path distinction generates institutional racism theory's most important implication: Self-reflection and innocent intent do not forestall participation in path racism. . . . Path racism may occur even with exacting self-examination and the purest of intentions.

*Id.* at 1822-23.

96. *Id.* at 1823.

97. In my interviews with law review editors, the interviewees often referred to the repetitive use of such terms without explanation when discussing their perceptions of bias. Interviews, *supra* note 66.

98. See Kissam, *supra* note 1, at 222.; Cf. William E. Nelson, *Standards of Criticism*, 60 TEX. L. REV. 447 (1982) (describing a similar situation in the evaluation of legal history scholarship).

bias for safe scholarship and against dissent scholarship, which can result in systemic bias in the article evaluation process. However, merely identifying these information asymmetries is insufficient to mitigate the potential for bias. Raising awareness on the part of law review editors is also not enough to mitigate the negative effects of systemic bias in article evaluation by law reviews.

To be better equipped to fight the fire behind the smoke or improve the atmosphere that is poisoning the canary, we also need to understand why bias might continue despite the desire of editors to counteract the effects of information asymmetries. Economic theory provides useful ways to understand the persistence of bias despite the best intentions. The following subsections utilize economic concepts of switching costs and network effects to identify hurdles that the legal academy faces in minimizing bias in article evaluation.

#### B. SWITCHING COSTS

Minimizing bias in article evaluation requires change on the part of professors, students, and the legal academy as a whole. As everyone who has tried to live up to their New Year's resolutions or quit a bad habit knows, change is easier said than done. People often decide to change with the best of intentions. Nonetheless, if they fail to address the underlying reasons for their long-standing habits or fail to think carefully about how to integrate new habits into their lives, they often do not succeed in changing for any extended period of time.

Switching costs help explain why editors and scholars may resist the changes needed to minimize bias in article evaluation despite their earnest desire to do so and the potential personal and societal benefits.<sup>99</sup> In the economic context, switching costs are incurred, for example, by a manufacturer who changes suppliers.<sup>100</sup> The manufacturer may have to recalibrate

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99. Forms of safe scholarship also persist as a dominant mainstream standard when legal academics and law review members are not interested in change because of the potential switching costs.

100. See generally Paul Klemperer, *Switching Costs*, in 8 THE NEW PALGRAVE DICTIONARY OF ECONOMICS, *supra* note 76, at 125-27; see also Lee, *supra* note 79, at 1282:

Switching costs are the costs of switching from one standard to another. They play a role in determining whether a [particular style] becomes an enduring standard. If the switching costs are high, it becomes more difficult to induce consumers to change their behavior. [E]ven when switching costs are low, they can be critical.

Other explanations include practices of omission and exclusion, network effects, and theories of path dependence. Omission and exclusion in the market for legal scholarship also help to maintain the norms and standards of safe scholarship. See Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 MICH. J. RACE & L. 263, 311 (2000). These network effects reinforce the dominance of the safe scholarship standard and "devalue compet-

its machines to use parts from new suppliers or pay for parts to be shipped by boat, whereas the parts used to be transported by truck from a nearby town. In everyday life, switching costs may be incurred by a consumer who changes from a PC to a Mac and finds that she needs to buy new speakers, a new monitor, and learn to use a new computer operating system. In the context of legal academia, switching costs can arise when students, professors, editors, and authors change the assumptions, ideologies, and methodologies they value when writing or evaluating legal scholarship.

One of the potential switching costs in the context of legal academia is a change in the cultural images of safe scholarship and the psychological or emotional effect of this on law review editors.<sup>101</sup> This may take the form of resistance to change because of a fear of having to reevaluate the premises on which they have based their understanding of the world and, more importantly, of themselves.<sup>102</sup> For example, many scholars and law students become attached to the ostensible neutrality and objectivity of doctrinal scholarship.<sup>103</sup> This attachment can, in part, be attributed to the current dominance of the law and economics movement in the American legal discourse.<sup>104</sup> This dominance contributes to the locating of methodologies that claim objectivity and neutrality on the safe end of the continuum by many editors and scholars. As a result, this may lead scholars and editors who are primarily familiar with doctrinal scholarship to resist scholarship that is not presented as objective and neutral. They may even determine that such scholarship is inferior because it is not presented as objective and neutral.

Questioning the supremacy of neutrality and objectivity requires assessing and judging each ideological, methodological, and value difference for itself. It will hopefully lead to questioning and reassessment of long-held individual, community, and societal values and assumptions. However, there are costs associated with questioning values and assumptions. Such open evaluation by each individual may lead to disagreements on relative value between people who start out sharing a discourse community. It may lead to value disagreement among people who have never disagreed.

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ing standards," explaining this "discrimination, even in the absence of racist intent or bias." Lee, *supra* note 79, at 1275.

101. Cf. Lee, *supra* note 79, at 1282 ("Although many Whites claim not to be especially aware of race, they identify their own race with confidence, and studies suggest that the value they place on this identification is extraordinarily high.").

102. Gazra, *supra* note 11, at 107 (citation omitted):

Advocates of storytelling's new themes claim that the tales are disturbing to legal scholars because they strike dangerously close to the things they hold most dear: legitimation, dominance, and superiority. Indeed, some stories are told primarily to uproot the premises upon which we have relied to order the world. It is no wonder, then, that there is resistance.

103. Kissam, *supra* note 1, at 252.

104. See generally HACKNEY, *supra* note 21.

These are costs that many may want to avoid. However, the potential benefit of this type of questioning and reassessment is the ripening of values and criteria for evaluation that are more refined and sophisticated as a result of the scrutiny they have endured.

A second switching cost might include the need to create new structures for selecting law review members. Creating such structures implies that the current structures are inappropriate, ineffective, or inaccurate, or all three.<sup>105</sup> The cost of accepting a need for change requires accepting that the current system is not ideal, which might lead many members to question whether their own selection would hold up to different values and standards. For legal academics, this might mean calling hiring, promotion, and tenure practices into question. In each case, such concerns could contribute to resistance to considering options for new structures.

Changing the institution of law reviews to be more receptive to competing standards likely will be messy, difficult, and unpredictable.<sup>106</sup> Law review editors who are willing and able to overcome their own biases must then contend with the biases of their fellow editors and with structural biases.<sup>107</sup> Their ultimate success, therefore, depends on a shared willingness to think beyond the limitations of safe scholarship at both an individual and a structural level.

A third switching cost could be the additional effort required to better educate law review members to provide the tools that they need to expand their analytical horizons beyond the norms and standards delimited by safe scholarship at both the individual and structural levels.<sup>108</sup> These are actual costs. Efforts to better educate and train law review editors will certainly cost time. It will require time for each law review and the institution as a whole to determine how to educate and train law review members and to put this into action. It will cost law professors time to develop standards and advise law reviews. It will cost each individual law review editor time, and time is a commodity that is already in short supply due to their position as law students.

This section has briefly sketched three types of switching costs that may accompany efforts to reform the law school curriculum and the article evaluation process on student-run law reviews. However, these are only examples. Switching costs will vary from editor to editor, law review to law review, and law school to law school. In addition to switching costs, other factors may hinder efforts to minimize bias in article evaluation.

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105. See generally GUINIER & TORRES, *supra* note 5, for a broad discussion of ways to move towards a valuation of difference.

106. See generally *id.*

107. See Lee, *supra* note 79, at 1270-71.

108. See *id.* at 1285.



### C. NETWORK EFFECTS

Although this Article focuses primarily on evaluation by individual editors, the larger social atmosphere is also relevant. The legal academy itself can be understood as a network, an interconnected system of individuals and groups. Editors do not evaluate in isolation, unconnected to or uninfluenced by other editors on their law review and the trends that they perceive in the legal academy. Network effects help explain the formation of shared perceptions of safe scholarship at a systemic level that overlap to some extent with "mainstream" legal scholarship.<sup>109</sup> They may also explain the inhibited development of competing standards for evaluation of various types of dissent scholarship.

In economics, a network effect describes a situation where the benefits to the users of a particular good or service are correlated with the number of other people who also use the same good or service.<sup>110</sup> The traditional example of this was the battle between the VCR and Beta technologies in the 1970s. Although Beta was arguably the better technology, VCRs achieved a broader consumer base, and VCRs won; Beta technologies eventually became obsolete.

In the context of legal academia, a network effect exists, for example, if the adherents to a particular ideology or methodology benefit when more people believe in the same ideology and use the same methodology. This can be seen when theories gain legitimacy once they have garnered a sufficient number of supporters. One consequence of network effects is that "fair competition based on traditional understandings of merit does not always occur."<sup>111</sup> In the article evaluation process, this can explain the persistence of a belief in the superiority of some methods and ideologies over others. This is not to say that some theories or arguments may not be superior to others but rather that we should not accept without question the assumption of merit associated with widespread legitimacy.

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109. See Lee, *supra* note 79, at 1266:

The network economic theory, which is widely accepted, posits that (1) contingent, historical context is important in determining market dominance; (2) a market might tip toward a particular standard for reasons other than the inherent merit or value of that standard; (3) once adopted, a dominant standard might become locked in and sticky; (4) the market might produce this outcome even where there is no single firm or entity guiding the maintenance of the standard; and (5) these conditions adhere in markets in which communication and interoperability are essential features.

110. Neil Gandal, *Network Goods (Empirical Studies)*, in 5 THE NEW PALGRAVE DICTIONARY OF ECONOMICS, *supra* note 76, at 913 ("A network effect exists if the consumption benefits of a good or service increase with the total number of consumers who purchase compatible products.").

111. Cf. Lee, *supra* note 79, at 1263 (citation omitted) (like network effects in general, racial antipathy is not needed to "maintain the dominance of the racial standard," because only regular economic incentives are needed).

In the network of legal academia, a jurisprudential theory or analytical methodology can be said to be a network standard when it has the support of a sufficient number of adherents or users. In this context, the term safe scholarship would describe an ideology, theory, or methodology that has achieved a sufficient number of adherents or users so that it can fairly and accurately be expected to be experienced as safe scholarship for a large number of law review editors or legal scholars. Thus, in this subsection, safe scholarship is referred to as being perceived as safe by a large number of people in the legal academy. It is scholarship that achieved a "safe" status at a systemic level.

Safe scholarship operates as a network standard in the article evaluation process in a variety of ways. Safe scholarship is a default standard for ideological and methodological assumptions. For example, an article written as a narrative may be dismissed out of hand as "not scholarship" because the narrative form is not valued by an editor who only values a subject-neutral, "scientific" form of legal analysis. The dominance of a particular form of safe scholarship can often lead to the perception that the standard at issue is "better" than other competing standards and that all scholarship should be judged against such standards. Here, it should be noted that there may be several theories, ideologies, and methodologies that have achieved *de facto* safe scholarship status at any given time but that this can and does change over time.

Network effects help to make and preserve theories, ideologies, and methodologies that have achieved the status of safe scholarship as indispensable criteria for "high-quality" legal scholarship. This insight contradicts common wisdom in the academy. Authors seeking to get published are often advised to produce a novel work that stands out so that the article is differentiated from the mass of others being submitted to law reviews. Accordingly, it would seem that dissent scholarship would have an advantage in a context where uniqueness is highly valued. Nonetheless, this expected advantage is thwarted by the structures and biases that maintain the dominant position of safe scholarship in a particular network.<sup>112</sup> In a network context, dissent scholarship incorporates theories, ideologies, or methodologies, or a combination thereof, that have not yet achieved enough adherents or users to achieve the assumed legitimacy at a systemic level that is ascribed to safe scholarship.

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112. See Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1, 16 (1995). ("The aim is not to include outsider voices in scholarship in order to perfect a knowledge still understood as universal and monolithic, but rather to create intellectual space in our scholarship for competing truths, coexisting and contradictory, vying for dominance and demanding an audience.").

The use of a particular style of writing or way of analyzing an issue is "behavior that exhibits network effects."<sup>113</sup> Authors producing safe scholarship use a set of words, definitions, grammatical rules, idioms, and socio-cultural norms that allow them to communicate in a familiar way with others familiar with the norms within that category of safe scholarship.<sup>114</sup> Thus, safe scholarship increases in value proportionately to the number of people using its norms and standards, and the article evaluation process is creating a pressure to conform to the norms and methodologies of safe scholarship.<sup>115</sup> It is irrelevant that a style is substantially better if everyone else is judging it by a different standard.<sup>116</sup> For example, narrative allows the author to relate the experiences of harm by specific groups that may be underrepresented in the legal academy in the way that the individuals in those groups experienced them.<sup>117</sup> This provides insights that a neutral doctrinal analysis does not.<sup>118</sup> However, editors who have not been exposed to legal narratives may categorize it as "not scholarship" because they are unfamiliar with this form of legal discourse.<sup>119</sup>

Where there are network effects, such as in the article evaluation process, the dominance of particular perspectives, ideologies, methodologies, standards, or norms is not inherent.<sup>120</sup> It is not necessarily the relative features that determine which ideology or methodology is dominant.<sup>121</sup> The insights of network economics tell us that once an ideology or methodology has a head start and a broad user base, it continues to expand its hold whether or not it is the best standard.<sup>122</sup>

An ideology or methodology that achieved a dominant position where there are network effects can be maintained with the help of ordinary incentives, such as the desire to reward merit or promote a rigorous legal discourse.<sup>123</sup> No targeted effort is required to maintain that dominance.<sup>124</sup> Positive feedback solidifies the position of the dominant ideology, methodology, standard, or criteria and makes it difficult to change.<sup>125</sup> Efforts to

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113. See Lee, *supra* note 79, at 1269.

114. *Id.*

115. See *id.*

116. See *id.*

117. See Foster, *supra* note 34, at 2037.

118. See *id.*

119. For a discussion of the critiques of and responses to narrative scholarship, see generally Abrams, *supra* note 34.

120. Lee, *supra* note 79, at 1265.

121. *Id.*

122. *Id.*

123. *Cf. id.* at 1267 (discussing the impact of network economics within a racial paradigm).

124. See *id.*

125. See *id.*

change the dominant standard run up against a collective action problem.<sup>126</sup> It is very difficult to successfully achieve change unless a sufficient number of people raise challenges and are willing to question standards of safe scholarship at the same time.<sup>127</sup>

As discussed above, there is a potential for bias in article evaluation due to information asymmetries. This is reinforced by switching costs and network effects. Switching costs and network effects often contribute to the self-reinforcing nature of dominant standards.<sup>128</sup> Therefore, a concerted effort is needed to change or at least call dominant standards into question. The next section discusses ways to mitigate bias in article evaluation by law reviews.

#### IV. THE ARTICLE EVALUATION TOOL BOX

The potential for bias in article evaluation and the evidence that such bias skews the evaluation of articles indicate a need to take action to improve student editors' ability to evaluate articles. The goal is to achieve more accurate evaluation of scholarship, generally, and of dissent scholarship, specifically. The focus is on minimizing bias in the evaluation of dissent scholarship since it is here that bias is likely to have a more distorting effect. These reforms are unlikely to evolve out of the current institutional structures due to switching costs and network effects. Therefore, minimizing bias in article evaluation requires a concerted effort by law professors and students alike.

As discussed above, the breadth and depth of American society demands multiple norms, standards, ideologies, and methodologies because of the inherent inability of any one scholarly standard or norm to capture the complexities of American society. The publication of scholarship representing a variety of ideologies and methodologies facilitates the analysis of legal issues from multiple perspectives. However, history suggests that new ideas, perspectives, and methodologies are not always welcome.<sup>129</sup> Therefore, one can understand the law review marketplace of ideas as a situs of the struggle over how to understand, experience, and assign value to different understandings of the law in our society.<sup>130</sup> Exclusion of scholar-

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126. Cf. Lee, *supra* note 79, at 1267.

127. See *id.*

128. See *id.*

129. For an example, see Farber & Sherry, *supra* note 34 (critiquing the value of narrative as scholarship).

130. Cf. Harris, *supra* note 22, at 773. For a more in-depth discussion of this struggle, see generally Sylvia R. Lazos Vargas, "Kulturkampf[s]" or "Fit[s] of Spite"?: Taking the Academic Culture Wars Seriously, 35 SETON HALL L. REV. 1309 (2005). See also Romero, *supra* note 32, at 51 ("The traditional war between paradigms is replaced with a global struggle between communities in interaction, so that knowledge seems to be more eclectic and is constructed from within multiple points of view.").

ship that uses competing perspectives, ideologies, methodologies, and standards creates false impressions. It creates the illusion that published ideologies and methodologies are representative without requiring an analysis of whether or not this representation is accurate. It establishes a norm and assumes that this norm is appropriate and accurate even when this assumption is wholly unsubstantiated.<sup>131</sup> It fosters surreal discussions and leads editors and scholars to incorrectly believe that their discussions encompass all the views of race, class, gender, and sexual orientation.

To minimize bias in article evaluation, each law review needs to develop an awareness of the effects of such biases and a desire to change. Since the potential for bias in the article evaluation process became entrenched in the context of law schools and law reviews as an institution, the most effective responses will come from the institutions rather than solely through the efforts of individuals.<sup>132</sup> This is not meant to suggest that individuals will not play an important role. Reforming institutions requires changing collective understandings while establishing new standards and methods for evaluation at both an individual and an institutional level.<sup>133</sup> Law professors and law review editors should play a role in developing tools to strengthen the article evaluation process.

As I discussed in earlier sections, the challenges of evaluating articles are not unknown. Some legal scholars theorize the evaluation of scholarship, albeit with a focus on legal scholars rather than law students. Others theorize the contributions of diversity in legal scholarship. Still others argue for the development of critical reading pedagogy in law schools. This section builds on earlier scholarship by Philip Kissam, Rubin, Beverly Ross, and Elizabeth Fajans and Mary Falk.<sup>134</sup>

Kissam, in his 1988 article, *The Evaluation of Legal Scholarship*, describes essential characteristics of any valuable scholarship.<sup>135</sup> These characteristics include factual accuracy, comprehensible writing, and the use of appropriate methods.<sup>136</sup> However, it may be difficult for editors to evaluate these characteristics because, for example, editors may lack sufficient knowledge or experience, due to information asymmetries, to determine

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131. See Rubin, *supra* note 3, at 900 ("Ideology has the interesting attribute of making opposing normative beliefs seem incorrect — not as a matter of normative debate, but as a matter of objective truth.").

132. See Lee, *supra* note 79.

133. *Id.*

134. See generally Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993); Kissam, *supra* note 1; Ross, *supra* note 38; Rubin, *supra* note 3.

135. Kissam, *supra* note 1, at 228 ("Any valuable scholarship must be factually accurate, written in a comprehensible manner, and be based on appropriate methods, be they research, analytical, interpretive, or narrative, which are designed to achieve the scholar's purposes.").

136. *Id.*

whether the methodology selected is appropriate for the scholar's purposes.

In *A Theory for Evaluating*, Rubin proposes four criteria for the evaluation of safe scholarship, or in Rubin's terminology, scholarship that is close to the evaluator in both ideology and methodology. These criteria are: clarity, persuasiveness, significance, and applicability.<sup>137</sup> However, according to Rubin, in their unmodified form, these criteria should only be used in the limited situation where the evaluator, in this case the law review editor, evaluates an article that is not foreign to the editor in terms of her own normative and methodological frameworks (safe scholarship).<sup>138</sup>

In her 1996 article, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, Ross analyzes the value of diversity in legal scholarship.<sup>139</sup> This article identifies criteria that can be useful in the evaluation of scholarship. The criteria are: contributing to a better understanding of what the law is accomplishing, what the law should accomplish, and from whose point of view the law operates.<sup>140</sup> These general questions present a solid starting point but could be developed in greater detail to make them easier to implement by law review editors.

The criteria and questions identified by Fajans and Falk in their 1993 article, *Against the Tyranny of Paraphrase: Talking Back to Texts*, are more specific.<sup>141</sup> Fajans and Falk identify four close-reading categories: context, style, omission, and interpretative posture. These criteria are more specific than those drawn from Ross above, and lend themselves to a close-reading of an article.

Due to information asymmetries, editors may find it difficult to appropriately modify Rubin's criteria of clarity, persuasiveness, significance, and applicability or Kissam's criteria for valuable scholarship. Students may find it challenging to satisfactorily determine how an article measures up to Ross's criteria or decide when to delve more deeply into the categories identified by Fajans and Falk. Generally, students have not yet developed an in-depth knowledge of a particular subdiscipline (as the base from which to modify) in the way that is only possible with a time-intensive immersion in the scholarship of a particular subdiscipline.

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137. Rubin, *supra* note 3, at 962:

(1) [C]larity, the extent to which the work identifies its normative premises; (2) persuasiveness, the extent to which the evaluator believes the work should convince the public decision makers whom it addresses; (3) significance, the extent to which the work relates to the ongoing development of the field; and (4) applicability, the extent to which the evaluator believes that the work contains an identifiable insight that could be used by other legal scholars.

138. *Id.*

139. See generally Ross, *supra* note 38.

140. See *id.*

141. Fajans & Falk, *supra* note 134. This article was the first call for critical reading pedagogy in law school.

This section synthesizes the insights and contributions of Rubin, KISSAM, ROSS, and Fajans and Falk and applies them to the process of article evaluation. It lays out a framework for the evaluation of articles by student editors with an emphasis on strengthening their substantive and procedural abilities to evaluate scholarship generally and dissent scholarship in particular. Keeping experience-based and education-based information asymmetries in mind, this section develops an initial structure that can be used by editors, law reviews, law review advisors, and legal educators in general. It builds on established criteria for the evaluation of scholarship and integrates insights from rhetorical theory and reading theory. Although this framework is necessarily rudimentary and should be modified to the needs and goals of specific individuals and institutions, it provides a basic starting point for minimizing bias in article evaluation.

Institutional retraining is an appropriate response to the potential for bias in article evaluation by law reviews because bias for safe scholarship has been institutionalized.<sup>142</sup> Institutional retraining can take on myriad forms. For law reviews, institutional retraining can include training in legal history, theoretical developments, and current trends in jurisprudence. Law reviews may find it useful to develop and provide to their members a reading list on theories for evaluating legal scholarship as well as seminal examples of scholarly subdisciplines and methodologies. Senior editors could facilitate discussions among law review members each year about the values and assumptions held by individual members and how they relate to the law and legal scholarship. For law schools and legal academics, institutional retraining might incorporate a regular discussion among faculty members concerning the values and assumptions held by the faculty as they relate to the law and legal scholarship. Another option would be to examine the law school curriculum for opportunities to increase the integration of legal scholarship, historical developments, and current trends in jurisprudence into the curriculum, whether in the form of specific classes or using the pervasive method.

Another aspect of retraining is familiarizing editors with unfamiliar forms, styles, and methodologies in scholarship. In the end, the need remains for more guidance by legal scholars through the development of standards and criteria that are specific to subdisciplines, and articulation of standards and criteria so that they can be used by law review editors.<sup>143</sup> The development of standards and criteria is a task that should be taken on by scholars engaged in relevant subdisciplines. Although this is an endeavor that is beyond the scope of this Article, hopefully, this Article will

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142. See Haney López, *supra* note 94, at 1827.

143. For a bibliography of emerging forms of scholarship that may be useful in the development of standards and criteria that are specific to subdisciplines, see Beazley & Edwards, *supra* note 1.

be a catalyst in the proliferation of a plurality of standards and criteria that could assist law review editors in the article evaluation process.

Institutional retraining can increase law review members' familiarity with a plurality of norms and standards as well as give them alternatives to institutional scripts that are biased in favor of safe scholarship. Although good intentions alone are insufficient, retraining can contribute to developing the skills necessary to work competently with a plurality of standards. Institutional retraining helps editors to identify appropriate standards and make more informed choices.

Training for law review editors should include an introduction to the structural and institutional biases that maintain safe scholarship as a dominant standard. In settings such as the law review article evaluation process, certain forms of bias may have become integrated into the procedural routine, and law review editors may, therefore, fail to recognize or insufficiently realize how their own experiences influence their motivations. Developing an awareness of their own ideological and methodological biases will help them to strengthen their evaluation skills and more accurately consider the merits of the articles they evaluate.

Retraining should educate editors to recognize and evaluate a plurality of norms and methodologies. It should help editors to further develop their reflective reading and evaluation skills. Although the following sections emphasize particular questions or skills at different stages in the evaluation of an article, these questions and skills are interrelated and should be kept in mind throughout the evaluation process. Further, although the evaluation process is divided into separate stages for the purposes of this article, in practice these stages can and should take place simultaneously where appropriate.

#### A. TRIAGING: READ OR REJECT? (STAGE 1)

Although every law professor hopes that his or her article will be read in its entirety by every law review to which it is submitted, the reality is that many law reviews receive hundreds of submissions each year. As discussed above, Christensen and Oseid's article suggests that many articles are evaluated and rejected in thirty minutes or less.<sup>144</sup> One-on-one discussions with current and former law review editors suggest that this may be reduced to one to five minutes in many cases. These comments indicate that the initial evaluation of law reviews, the triage stage in which editors decide whether they will immediately reject or spend more time reading an article, is of a cursory nature. Given the massive number of submissions to law reviews, which has only increased with the advent of mass electronic submissions, it is unrealistic to suggest that law review editors should substantially increase the time they spend at the triage stage. Therefore, insti-

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144. Christensen & Oseid, *supra* note 19, at 199.



tutional retraining for the triage stage should focus on strengthening the editors' ability to make more informed decisions quickly and minimize bias in the initial evaluation of articles.

One way to achieve this goal is to encourage editors to take each article as a starting point for analysis rather than use preconceived notions of merit. Then the editor can ask the following set of questions in their initial evaluation of an article.<sup>145</sup> The goal of these questions is to determine the purpose of the article and, thus, broadly speaking, where its value and contribution may lie. Each of these questions alerts the editor to potential contributions that the article makes that go beyond the editor's own frame of reference. Asking these questions helps create a procedural safeguard to minimize bias in article evaluation by encouraging editors not to reject an article out of hand without considering the merits of the article as identified by the author.

1. *Does this article claim to help us better understand what the law is accomplishing?*

This question helps editors assign value to articles that may raise an important issue although they are not yet proposing a way to address that issue. It highlights the fact that there are multiple stages to scholarship and to addressing legal issues. These include identification of problems, exploring possible ways to address these problems, critiquing proposed remedies, revising suggestions, and more.

2. *Does this article claim to help us better understand what the law should accomplish?*

This question highlights the functional role of the law in implementing the goals of society.

3. *Does this article claim to help us better understand from whose point of view or interest the law operates?*

This question reminds editors that not all legal scholarship is necessarily "scientific" or neutral and that legal scholarship can address the concerns of and effects of the law on different groups in different ways.

4. *Does this article claim to enable us to understand an interesting and difficult problem?*

This question helps editors assign value to articles that may raise an important issue without proposing a way to address that issue. It highlights the fact that there are multiple stages in scholarly discourse. These include

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145. These questions are drawn from Ross, *supra* note 38, at 802, and Kissam, *supra* note 1.

identifying problems, exploring possible ways to address these problems, critiquing proposed remedies, revising earlier proposals, and more.

5. *Does this article claim to have a direct and practical usefulness?*

This question reminds editors of the value of addressing issues of relevance to on-the-ground lawyering or to pressing current issues.

6. *Does this article claim to have theoretical significance?*

This question highlights the value of advancing theoretical knowledge even if it does not seem to have an immediate and clear application.

Asking these questions allows editors to determine whether an article merits a second look. Of course, this also places a burden on authors to make clear in their cover letter or introduction what the article contributes to the legal discourse. Assuming that the editor determines that the article may make a contribution to the legal discourse based on an affirmative answer to one or more of the six questions listed above, the article arguably is worth a second look.

B. IT'S WORTH A SECOND LOOK (STAGE 2)

Once the editor determines that an article is worth a second look, the next question is whether an article seems to achieve what it claims it sets out to do. Editors should consider asking the following set questions in their second look at an article.<sup>146</sup>

1. *How do the author's arguments correspond with or diverge from the editor's own perspectives and opinions?*

This question focuses on reading to identify background information that may allow editors to recognize a connection between the article and their own experiences or reactions.<sup>147</sup> It also helps editors identify situations where they experience a sense of general discomfort with an article resulting from a deviation from expected norms. This may signal to the editor that a particular article is located on the dissent end of the spectrum for that editor and thereby indicate that the editor should be vigilant so as to minimize the effects of her own bias. This requires reflective reading, which is discussed in more detail in Stage 3 below.

2. *Where does the author locate the article within relevant historical, social, political, and legal contexts?*

This question encourages the editor to consider the contribution of an article in a particular subdiscipline or to a particular debate. It helps the

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146. These questions are adapted from Fajans & Falk, *supra* note 134.

147. See Kissam, *supra* note 1, at 248.

editor to identify contributions that the article makes to issues that are outside the scope of the editor's own experience or knowledge. This requires reading for context, which is discussed in more detail in Stage 3 below.

3. *What are the article's silences, and what discourse communities does the article exclude?*

Reading for omissions helps editor to identify the author's biases. Here additional questions may be helpful: What is being left out? What is being ignored? What is being dismissed as unimportant? What has been marginalized?<sup>148</sup> By asking these questions, an editor may identify potential critiques or weaknesses of an article. This requires reading for omission, which is discussed in more detail in Stage 3 below.

4. *Which external standards should be used to judge the article?*

This question reminds the editor that she needs to identify the appropriate standards with which to evaluate a specific article because the appropriate standards vary from article to article. It highlights the importance of determining what arguments and evidence are relevant to the discourse community in whose tradition the article is written, including the engagement of relevant competing arguments and evidence. This requires critical reading, which is discussed in more detail in Stage 3 below.

5. *What types of rhetoric and style does the author employ?*

This question focuses the editor's attention on how an author uses language and whether the author employs rhetorical vehicles that are effective for the purposes for which they are used. Reading for rhetoric and style encourages the editor to consider methodologies that are outside the scope of the editor's own knowledge. This may also signal to the editor that a particular article is located on the technical dissent end of the spectrum for that editor. This should remind editors to be attentive so that they can minimize the effects of their own bias. This requires reading for rhetoric and style, which is discussed in more detail in Stage 3 below.

C. IN-DEPTH EVALUATION (STAGE 3)

Reading "is a *skill set* — a collection of thinking tools we choose from as we interact with texts of many types"<sup>149</sup> that enables editors to generate knowledge about a specific article. Developing a targeted set of reading skills is important because it gives editors the specific tools necessary for a sophisticated and accurate evaluation of scholarship. These tools assist students in overcoming information asymmetries as well as reducing the potential for bias in the article evaluation process.

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148. Barbara Johnson, *Interview*, in CRITICISM IN SOCIETY 152, 164 (Imre Salusinsky ed., 1987).

149. MCKINNEY, *supra* note 86, at 51.

Accurately evaluating scholarship also means reviewing and redefining the norms and standards used to determine an author's competence and the quality of the article in question. Standards of competence or quality should be continually questioned, defined, and redefined to ensure evaluation proficiency in the changing landscape of legal scholarship.<sup>150</sup> Where editors initially identify an article as dissent scholarship and, therefore, as requiring an evaluation that will differ in some way from the process that they use for safe scholarship, they are then faced with the question of how to proceed from a practical standpoint. The following subsection discusses ways to read dissent scholarship more closely. Of course, these skills also apply to the evaluation of legal scholarship generally.

Although editors developed reading and analytical skills prior to and during law school, there is still a need to retrain editors at an institutional level to develop reading skills specific to the evaluation of legal scholarship. It is more challenging to evaluate new information in a new field than it is to evaluate and integrate information in a format with which one is familiar.<sup>151</sup> This challenge can increase the potential for bias because people are less interested in evaluating articles addressing issues where the subject matter, format, or both are unfamiliar.<sup>152</sup> Just like everyone else, law students prefer to do things that they can do well. However, developing specialized reading skills can aid law review editors in developing their ability to engage with unfamiliar content and methodologies. Moreover, the more unfamiliar an article's ideology or methodology is to an editor, the greater the difficulty involved in evaluating the article.<sup>153</sup> Developing specific reading skills can help editors bridge this gap and reduce the potential for bias.

The "reading skill" set is divided into five categories:<sup>154</sup> reflective reading, reading for context, reading for omission, critical reading, and reading for rhetoric and style. This section discusses each of these in turn.

### 1. Reflective Reading

Editors' reactions matter. This is not an attempt to deny the importance of editors' reactions, values, and opinions, but rather to foster reflec-

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150. See MINA P. SHAUGHNESSY, *ERRORS AND EXPECTATIONS: A GUIDE FOR THE TEACHER OF BASIC WRITING* 228 (1977). Cf. Nelson, *supra* note 98.

151. MCKINNEY, *supra* note 86, at 33.

152. See *id.* at 153 (citing MICHAEL PRESSLEY & PETER AFFLERBACH, *VERBAL PROTOCOLS OF READING: THE NATURE OF CONSTRUCTIVELY RESPONSIVE READING* 75 (1995)).

153. Rubin, *supra* note 3, at 962 ("As the work becomes more foreign, and hence more threatening to the evaluator, the individual judgment which is required in order to use these criteria becomes less reliable.").

154. Categories (1), (2), (4), and (5) of evaluation are adapted from McKinney's four levels of evaluation for reading cases. See MCKINNEY, *supra* note 86, at 154.

tions on these reactions, values, and opinions. Reflective reading focuses on reading to identify background information that may allow the editor to recognize a connection between the article and her own experiences or reactions.<sup>155</sup> Reflective reading considers the reader's thoughts and feelings about the article both before and while reading. Reflective reading answers the question: *How do the author's arguments correspond with or diverge from the editor's own perspectives and opinions?*

Individual law review editors may experience a sense of general discomfort with an article resulting from unexpected differences and deviation from expected norms. Although this experience may initially seem similar to the feelings associated with emotional switching costs, it differs in important ways. Discomfort with an article's unfamiliar ideologies or methodologies are due, at least in part, to confronting the ideologies or methodologies employed by the author. Emotional switching costs occur when the reader, for example, is confronting the implications of changing or reevaluating her own values and the associated norms and assumptions. In the former situation, the discomfort is alleviated by rejecting the unfamiliar ideologies or methodologies. In the latter situation, the discomfort is alleviated by resisting change due to a fear of questioning one's own biases and assumptions, which can lead to systemic bias.

Editors often lack mechanisms with which they can differentiate between a response connected to a specific article and a symptom of a systemic bias. Where the object of evaluation is dissent scholarship, Rubin's theory suggests employing an editor's reactions of doubt or anxiety in response to dissent scholarship as a test and as a modifier for the above criteria.<sup>156</sup> Such responses can be used as a test whereby the formulation of counter-arguments by the evaluator becomes, in and of itself, a positive indicator of the potential value of that article.<sup>157</sup> This test serves as an indication that an editor is faced with the evaluation of dissent scholarship as opposed to safe scholarship. Editors can use this moment as an opportunity to think more closely about how to exercise their judgment rather than simply rejecting an article out-of-hand.

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155. See Kissam, *supra* note 1, at 248.

156. Rubin, *supra* note 3, at 962. Where doubt and anxiety are to be used as modifiers of the criteria of clarity, persuasiveness, significance, and applicability, Rubin's theory assumes an evaluator that is a legal scholar well-versed in the ideologies and methodologies of at least one subdiscipline of legal scholarship. However, since this is often not applicable for law review editors, these responses are addressed here in more detail.

157. See *id.* at 946:

[T]he test is whether the evaluator experiences sufficient doubt or anxiety so that she must persuade herself that she is right. If one finds oneself rehearsing one's prior arguments, or articulating refutations in one's mind, or searching assiduously for new ways to justify one's conclusions, then a work which generates such responses should be judged to be of value.

This feeling of discomfort can also be used as an opportunity to apply insights of reader-response theory to the evaluation of articles. In essence, reader-response theory focuses on the responses of the editor to a particular article. Editors prioritize “subjective criticism,” whereby they focus on their own response as the reader of the article rather than the article’s arguments.<sup>158</sup> In a next step, editors then change their perspective, and try to put themselves in the author’s shoes in order to understand the author’s motivations and choices.<sup>159</sup> Thus, editors can compare how they perceived the article to how they believe the author may have intended the article to be received.<sup>160</sup>

## 2. Reading for Context

It is important to put scholarship into an appropriate historical, social, political, and legal context. Reading for context requires the editor to consider the author’s possible biases, assumptions, and perspectives, and to understand the author’s discourse community. This skill set involves two contextual perspectives: the scholarly context of the article and the general context of legal scholarship.<sup>161</sup> It is also important to understand an article’s connection to other projects even if it is unclear what contribution it makes standing alone.<sup>162</sup>

Being able to put an article into the appropriate historical, social, political, and legal context helps the editor to identify contributions that the article makes to issues that are outside the scope of the editor’s own knowledge. It encourages the editor to consider the contribution of an article to a particular subdiscipline or to a particular debate. Reading for context answers the question: *Where does the author locate the article within relevant historical, social, political, and legal contexts?*

## 3. Reading for Omission

While it is important for editors to put themselves in the author’s shoes so that they can better recognize how the author may have intended an arti-

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158. Fajans & Falk, *supra* note 134, at 181.

159. SHAUGHNESSY, *supra* note 150, at 223.

160. *Id.*

161. Fajans & Falk, *supra* note 134, at 195. For example, referring to the reading of cases, Fajans and Falk point out that:

Judith Resnik and Carolyn Heilbrun make a powerful case for understanding the lower-court context of judging by showing how the “facts” of a battered-wife homicide case were transformed as the case worked its way through the appellate process. They argue that no amount of pure textual analysis will ever allow us to hear the full range of the appellate “voice.”

*Id.* at 195 (citing Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1940 (1990)).

162. For a more detailed discussion of the value of scholarship that contributes to a larger project, see Kissam, *supra* note 1, at 225-26.

cle to be understood,<sup>163</sup> it is equally important to understand the author's biases. Reading for omission answers the question: *What are the article's silences and what discourse communities does the article exclude?* One can read for omission by reading for unintelligibility and lack of consistency.<sup>164</sup> Another set of questions can be useful here. Editors can ask: What is being left out? What is being ignored? What is being dismissed as unimportant? What has been marginalized?<sup>165</sup> By asking these questions, editors may identify potential critiques or weaknesses of an article. Questions addressing specific omissions may also be informed and developed by reading for context, as discussed above. Every article will have omissions. The question for editors is whether such omissions represent fatal flaws, whether they can be addressed in the editing process, or whether they detract from the strength and completeness of the author's argument.

#### 4. Critical Reading

Critical reading applies an external standard to evaluate an article.<sup>166</sup> Critical reading asks the question: *Which external standards should be used to judge the article?* After asking this question, critical reading requires the evaluation of the article by the standards of the theories and methodologies to which it lays claim. At the same time, effective evaluation of scholarship also requires law review editors to respect values, ideologies, norms, and perspectives that differ from their own or those they hold in high esteem.<sup>167</sup> The evaluation of scholarship should also consider an article's engagement of competing arguments and evidence.<sup>168</sup> There are multiple ways that law review editors can access external resources when they lack sufficient background or substantive knowledge to comfortably evaluate a given article, such as peer review, external advisory boards, and guest faculty or practitioner editors. Such options have been discussed extensively by Kissam and others.<sup>169</sup>

#### 5. Reading for Rhetoric and Style

Accurately valuing dissent scholarship should also include stylistic diversity. While novelty is a seemingly undisputed criterion for publication in a law review, stylistic novelty is often either ignored or devalued for not meeting the standards of mainstream legal scholarship. For example, this is often true for the narrative form.<sup>170</sup> A full evaluation of an article requires

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163. SHAUGHNESSY, *supra* note 150, at 223.

164. Fajans & Falk, *supra* note 134, at 199.

165. Johnson, *supra* note 148, at 164.

166. *See id.* at 248.

167. *Id.* at 250.

168. *See id.* at 249.

169. *See, e.g.,* Kissam, *supra* note 1.

170. *See, e.g.,* Farber & Sherry, *supra* note 34, and the subsequent response by Delgado, *supra* note 34.

more than reading reflectively, critically, and for context and omission. It also requires reading for rhetoric and style.<sup>171</sup> This can also be described as a law and literature inquiry.<sup>172</sup>

Reading for rhetoric and style focuses on the author's intent, use of rhetorical figures, use of metaphors, characterizations, word choice, and syntax.<sup>173</sup> It is important to explore and understand the use of rhetoric because understanding how scholars use language and tell stories helps us to understand the role of normative messages in legal scholarship.<sup>174</sup> The evaluation of scholarship should take the benefits of unusual or unexpected styles into consideration because these styles may, for example, be intended to help the author to connect with a particular audience.<sup>175</sup> Reading for rhetoric and style answers the question: *What types of rhetoric and style does the author employ?* The question for editors is whether the article is well written and whether the author employs effective rhetorical vehicles.

Reading for rhetoric and style encourages editors to consider methodologies that are outside the scope of their own experience, knowledge, or comfort zones. Where an editor experiences feelings of doubt or anxiety or a strong negative response to an article, this may indicate that the article is located on the technical dissent end of the spectrum for that editor. It also alerts editors to be aware so that they can minimize the effects of their own bias.

## V. CONCLUSION

The evaluation of articles by law reviews has a significant effect on legal scholars, academic institutions, the legal discourse, and, ultimately, on our society. Although some might claim that this is an overstatement, if we look at article evaluation on a case-by-case basis and in the aggregate, there is a truth that underlies this claim. What law review editors do in the article evaluation process matters in ways that can have far-reaching effects.

Law review editors, like legal scholars and the rest of humanity, must use their best judgment if the goal is to achieve the best outcomes. However, even one's best judgment is subject to idiosyncrasies that, on a systemic scale, may result in systemic bias. Law review editors, because of their particular position in the legal academy's production of knowledge, have a potential for bias that differs from, say, law professors' potential for bias. Therefore, specialized tools and procedures need to be developed to

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171. See Fajans & Falk, *supra* note 134, at 196.

172. *Id.*

173. *Id.* at 198-99.

174. David Ray Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145, 146 (1990).

175. Kissam, *supra* note 1, at 248-49.



address information asymmetries that are peculiar to law review editors in the fulfillment of their duties.

Finding ways to mitigate this potential for bias should be a common goal of editors and academics alike so that each can better fulfill their role in fostering and contributing to a rigorous intellectual discourse. Understanding hurdles to reforming the law review institution is an important step. A further step is to implement reforms in the day-to-day article evaluation process. This Article has identified some possible paths for reform, but there is still much work to be done. Ideally, it will be a process that engages law review editors and legal scholars in a joint effort.

Returning to the metaphor with which I began this article, the smoke of law professor complaints signals an opportunity to strengthen the evaluation of articles by law reviews and avoid suffocation of a rigorous legal discourse. Ideally, this Article will serve as a jumping off point for further research in this area. From an immediate perspective, it is a starting point for individual editors and law reviews that are interested in strengthening their article evaluation process.